89-980

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

CHARLES R. HEFTI and
MARION C. HEFTI,

Petitioners,

v.

UNITED STATES OF AMERICA, and
R. MICHAEL WILLIAMSON, and
BRENDA KESSELL, Revenue Agents,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Charles M. Shaw
Attorney for Petitioners
168 N. Meramec, Suite 150
Clayton, Missouri 63105
(314) 725-9700

Preliminary Matter

Questions Presented

I. Whether the Eighth Circuit Court of Appeals by failing to render an opinion on a question of constitutional dimension properly before it, as clearly shown by the record, so far departed from the usual course of judicial proceedings so as to deny Petitioners of their constitutional rights, and so as to call for this Court's power of supervision to correct the error.

II. Whether Petitioner can be forced in a civil case to "turn over" possession, custody, and control of original business and personal records to the IRS by their issuance of an administrative summons to produce records for audit. Whether such action amounts to a general warrant or writ of assistance and illegal seizure under U.S. Constitution Amendments Four and Fourteen.

III. Whether the Eighth Circuit Court of Appeals in affirming the lower court's contempt order sanctioned a departure by the

lower court so far removed from the usual course of judicial proceedings and denying Petitioners of their constitutional rights so as to call for this Court's power of supervision to correct such error.

(a) Whether a district judge can hold a party to be in contempt based upon his re-interpretation of the order of another judge utilizing the reasoning of collateral estoppel and not based on the wordage of the original order at a time when the related order was properly on appeal.

IV. Whether the Trial Court lost jurisdiction on the 1983 tax case when same was petitioned to the Tax Court. Whether the IRS lost its basis of good faith needed for enforcement of summonses after it assessed taxes for 1983, 1984, and 1985 under a Form 1099, and whether the IRS lost its basis of good faith needed for enforcement of summonses after Petitioner allowed IRS to inspect and photocopy original records for 1983, 1984, and 1985.

List of Parties

Brenda Kessell, Revenue Agent
R. Michael Williamson, Revenue Agent
Internal Revenue Service
U. S. Court & Custom House
1114 Market Street
St. Louis, Missouri 63101

William S. Rose
Gary B. Allen
William A. Whitledge
Calvin C. Curtis
Attorneys, Tax Division
Department of Justice
P. O. Box 502
Washington, D.C. 20004

Table of Contents

Table of Authorities

Prayer

Come now Petitioners and pray this Court that it issue a Writ of Certiorari to the United States District Court for the Eighth District to review an order of that Court upon which rehearing was denied on August 17, 1989. The order of the Appellate Court affirming judgments entered in two companion cases in lower court wherein Respondents were held in contempt in one case and in both cases ordered to turn over physical possession and custody of their original personal and business records to the Internal Revenue Service. Petitioners state that such orders and the affirmance of them was improper and that the judgments therein call for correction by this Court under its powers of supervision.

Opinion Below

The opinion of the United States District Courts on issuance of their respective orders to produce, the opinion of the United States Court of Appeals in

removing a stay of execution, and the final opinion of the United States Court of Appeals all are hereto appended.

Jurisdiction to Review

The date of the denial of Respondents' motion for hearing in the United States Court of Appeals, Eighth Circuit, sought to be reviewed is August 17, 1989.

The jurisdiction of this Court is invoked under §1651(a) of Title 28, United States Code.

Constitutional and Statutory Provisions

United States Constitution Amendment IV--Searches and Seizures

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U. S. Constitution Amendment XIV

> Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any

person within its jurisdiction the equal protection of the laws.

Section 2. Deleted.

Section 3. Deleted.

Section 4. Deleted.

Section 5. Deleted.

26 U.S.C.A. 7602, Examination of books and witnesses.

(a) Authority to summon, etc. -- For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person and respect of any internal revenue tax, or collecting any such liability, the Secretary is authorized --

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of the books of account containing entries relating to the business of the person liabile for tax or required to perform the act, or any other person the Secretary may deem proper, to appear before the Secretary at a time and place named in the summons and to produce such books, papers, records, and other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the

person concerned under oath, as may be relevant or material to such inquiry.

(b) Deleted.

(c) Deleted.

26 U.S.C. 7604, Enforcement of summons

(a) Jurisdiction of the district court. If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

(b) Enforcement. Whenever any person summoned under §6420(e)(2), §6421(f)(2), §6427(j)(2), or §7602, neglects or refuses to obey such summons or to produce books, papers, records, or other data, or to give testimony, as required, the Secretary may apply to the judge of the district court or to United States commissioner for the district within which the person so summoned resided or is found for an attachment against him as for contempt. It shall be the duty of the judge or commissioner to hear the application, and if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States commissioner shall have the power to make such order as he shall deem proper, not inconsistent with the law for the punishment or contempts, to enforce obedience to the requirements of the summons and to punish such persons for its default or disobedience.

(c) Deleted.

Statement of the Case

The appeals herein center on orders of two separate District Judges relative to the enforcement of IRS summonses. The tax years inolved were 1983, 1984, and 1985. We, accordingly, will proceed by referring to the specific tax years, and to the Internal Revenue Service as IRS, and Respondents as Heftis.

Tax Years 1983 and 1984

The IRS was investigating taxpayers' federal income tax liability for the tax years 1983 and 1984. On July 15, 1986, IRS Agent R. Michael Williamson issued separate summonses to each taxpayer to produce records and other materials relevant to the IRS investigation of those tax years. The IRS thereafter alleged that taxpayers did not comply with the summonses. The Government then filed petitions to enforce the summonses. On February 4, 1987, after a hearing, a Federal Magistrate, Honorable R.

Kingsland, recommended that the summonses be enforced. The taxpayers filed objections to the recommendation and report of the Magistrate. On September 28, 1987, the District Court (Honorable John Nangle) adopted the Magistrate's recommendation and enforced the summonses. This was in the case of United States v. Hefti, No. 87-1220C(1) (E.D.Mo. September 28, 1987) (order). Taxpayers appealed and filed a motion for a stay pending appeal. On January 13, 1988, the Appellate Court denied taxpayers' motion for a stay pending appeal on the grounds that taxpayers had not shown any likelihood of success on the merits or irreparable injury. United States v. Hefti, No. 87-2556 (8th Cir., January 13, 1988) (order). The appeal was consolidated with a similar appeal involving taxpayers' records for the 1985 tax year and both appeals were dismissed upon taxpayers' motion to dismiss the appeal. Heftis immediately filed a motion to reinstate their appeals, stating that their

motion to dismiss was filed in error. The Eighth Circuit denied the motion to reinstate the appeals. United States v. Hefti, No. 87-2556 (8th Cir., April 20, 1988) (order) (consolidated with Appeal No. 87-2661). It should be noted that Heftis were acting as pro se counsel throughout this litigation.

Following the denial of the motion for stay pending appeal, the IRS alleged that the taxpayers continued to refuse to "turn over" their original records, a dispute having been in contest from the inception as to the meaning of production. The IRS filed its motion to hold taxpayers in contempt of Court for failure to comply with the District Court's September 28, 1987 order. Taxpayers filed a response in opposition. On February 19, 1988, the District Court ordered taxpayers to produce their records on or before March 15, 1988 and expressly advised them that if they did not comply, they would be fined $500.00 a day for each day of non-compliance.

Taxpayers filed a motion for relief or for reconsideration. On March 3, 1988, the District Court denied the motion and again ordered them to produce their records on or before March 15, 1988.

On March 15, 1988, taxpayers appeared at the IRS offices in Clayton with their 1983, 1984, and 1985 original records and offered to show them to the IRS agent. Taxpayers permitted the IRS agent to examine the original records and to make copies, but they refused to "turn over" physical custody and control of their original records to the IRS and leave as demanded by the IRS. The Heftis subsequently left the IRS offices with their original records.

On March 21, 1988, taxpayers filed a memorandum stating that they had complied with the February 19, 1988, order by "producing for examination" the relevant records and moved to have their appeals dismissed. The Government contended the taxpayers' conduct was not in compliance with

the February 19, 1988, order because taxpayers refused to "turn over" the custody and control of their original records to the IRS and filed a motion to reduce the fine to judgment and for issuance of a bench warrant. Judge Nangle transferred the case to Judge Gunn. The District Court scheduled a hearing on the motion for June 24, 1988; however, at the request of the Government, the hearing was postponed until July 1, 1988. On July 13, 1988, Judge Gunn issued his order finding that the Plaintiffs had substantially complied with Judge Nangle's order of February 19, 1988 to produce their original records to the IRS for examination, but that as of April 9, 1988, until the date of the hearing, they were in contempt because by virtue of "collateral estoppel" they were bound by an order issued in another cause by Judge Filippine on April 9, 1988, referred to below ; Judge Gunn, accordingly, found them in contempt, fined them $38,000.00, and issued a substantially different order that

directed taxpayers to "turn over" custody and control of their original records to the IRS. An appeal was taken from this new, final order to the Eighth Circuit Court of Appeals and was thereafter assigned Cause No. 88-2088, one of the two causes in this appeal.

Tax Year 1985

During the same period the taxpayers were also involved in litigation concerning their records for the tax year 1985 before another District Judge in the Eastern District of Missouri (Honorable E. Filippine). On February 17, 1987, the IRS issued separate summonses for the 1985 records which were under a similar demand by the IRS that the original, personal and business records be "turned over" to them, and the taxpayers refused to turn over control and custody of their original records to the IRS. On June 22, 1987, the IRS then petitioned for enforcement of the summonses, and on November 13, 1987, the District Court

granted the Petition for enforcement and ordered taxpayers to produce their 1985 records on or before November 20, 1987. United States v. Hefti, Nos. 87-Misc.-253, 87-Misc.-254 (E.D.Mo. November 13, 1987) (order). The taxpayers filed motions for stay of judgment. The District Court denied the taxpayers' motions for stay, to set aside, and to dismiss. On December 14, 1987, taxpayers filed an appeal and a motion for a stay pending appeal, which was denied. United States v. Hefti, No. 87-2661 (8th Cir. January 13, 1988) (order). As noted above, this appeal was consolidated with Appeal No. 87-2556 and both appeals were dismissed upon taxpayers motion to dismiss. United States v. Hefti, Nos. 87-2556, 87-2661 (8th Cir. April 20, 1988).

On January 27, 1988, the Government filed a petition for an order to show cause why taxpayers should not be held in contempt for failure to comply with the District Court's November 13, 1987, order directing

taxpayers to produce their records for examination by the IRS. The District Court issued show cause orders on February 26, 1988. On March 15, 1988, taxpayers met with the IRS agents in connection with their 1985 tax year records. The Heftis offered the original documents for inspection and for photocopying. The IRS refused to examine or photocopy the original records, insisting that the physical custody and control of the original records be turned over to them. The Heftis refused to turn over the physical custody of the original records. On March 21, 1988, taxpayers filed a memorandum with the Court stating that they had complied with the November 13, 1987, order and moved to have their appeals dismissed.

The show cause hearing was held on March 25, 1988. At the hearing taxpayers argued that they never received copies of the show cause orders and that the IRS did not include a certificate of service. On April 6, 1988, the District Court specifically rejected

taxpayers' argument that the term "produce" only required production and issued a substantially different, final order which directed the taxpayers to turn over the physical custody of their original records for tax year 1985 to the IRS by April 11, 1988, or they would be held in contempt of Court and fined $50.00 per day. United States v. Hefti, Nos. 87-Misc.-253, 87-Misc.-254 (E.D.Mo. April 6, 1988) (order). Taxpayers thereafter filed their appeal from this new, final order to the Eighth Circuit Court of Appeals and the same was numbered as No. 88-1838. There were no further hearings and/or orders in this case, and the Heftis were not held in contempt.

By motion of the IRS, the appeal, No. 88-1838, covering the tax year 1985, was consolidated with No. 88-2088, the appeal covering the 1983 and 1984 tax years.

Stay Order and Contempt Proceedings (1983, 1984 Tax)

In No. 88-2088 filed jointly with the

Heftis' appeal was a motion for stay of execution pending the appeal. The order was granted as a preliminary matter. On August 9, 1988, the Court vacated the temporary stay that had been granted on July 22, 1988, and in so doing issued an opinion stating the reason for the withdrawal of the stay. A copy of the same is, of course, attached in the Appendix. Because of their firm belief that they were being harassed and believed that the Government could not seize their original personal records without a search warrant, the Heftis continued to refuse to turn over the original records to the IRS.

The contempt hearing was held on July 1, 1988, by Judge Gunn. At issue was whether the taxpayers had complied with the District Court (Nangle) February 19, 1988 order to produce their records for the 1983 and 1984 tax years. Taxpayers again appeared pro se and were permitted to present testimony and witnesses. The Heftis produced substantial evidence to the record that they fully

complied with Judge Nangle's February 19, 1988, order by producing their original, personal business records on March 15, 1988, at the IRS office for inspection and photocopying, but that they refused to turn over the physical custody and possession of the original records as demanded by the Internal Revenue Service. The Heftis asserted that they had refused to leave their original records with the IRS because they feared the IRS would alter or destroy them as they had done with with previous records for the tax years 1980, 1981, and 1982. The Heftis believed that at the time they left the IRS office on March 15, 1988, they had complied in good faith with the February 19, 1988, order.

The District Court found that at the time of the March 15, 1988, meeting, taxpayers had "substantially complied with the February 19, 1988, order to 'produce' their records." United States v. Hefti, No. 87-1220C(1) (E.D.Mo. July 13, 1988) (order)

(see Appendix). However, the District Court (Judge Gunn) found that after taxpayers had received notice of Judge Filippine's April 6, 1988 order specifically stating that "produce" meant to "turn over" physical custody of their 1985 original, business, and personal records to the IRS, that taxpayers were then on notice that the February 19, 1988 order to "produce" their records for the tax years 1983 and 1984 required them to "turn over" physical custody of their original records to the IRS. In other words, and as stated by the Court, the Heftis were "collaterally estopped" by the order from another court, even though the other case involved a completely different case filed by the Government itself for a completely different tax year. The District Court assessed a fine of $500.00 per day from April 9, 1988 (allowing three days for taxpayers to receive a copy of Judge Filippine's April 6, 1988 order through the mail), to June 24, 1988 (the date that the

contempt hearing (Judge Gunn) was originally scheduled), for a total fine of $38,000.00. The District Court ordered taxpayers to pay the fine into the Registry of the Court and to turn over physical custody of their original records for tax years 1983 and 1984 to the IRS within ten days of the date of the order or they would be arrested and incarcerated until they did so. The Heftis appealed from this new, substantially different final order (88-2088).

Incarceration

The stay in this matter was lifted by the Eighth Circuit Court of Appeals on August 9, 1988, and on August 10, 1988, the Trial Court reissued its order giving Appellants until August 17, 1988, to comply. On August 18, 1988, while Appellant Marion Hefti was in court on another matter at the invitation of the Government, being Cause No. 88-1013C(6) (E.D.Mo.), Judge Gunn held a hearing on this cause (No. 88-2088), without notice, and with Ms. Hefti acting pro se.

Based on the testimony of an IRS agent (Brenda Kessell) that the Government needed custody and control of the original, personal, and business records to complete an audit and that compliance was not had, Appellant Marion Hefti was placed in the custody of the United States Marshal and jailed.

A motion for abeyance of the order was set for hearing on August 26, 1988, and a hearing was held, at which time Appellant Marion Hefti was released and Appellant Charles Hefti was incarcerated. On September 14, 1988, Judge Gunn issued an order releasing the Appellant. Various motions and writs were filed in relation to the incarceration but are not directly relevant to this appeal.

Existence of Jurisdiction Below

Original jurisdiction in the District Court was based on 28 U.S.C. 1331, 26 U.S.C. 7401, 26 U.S.C. 7402, and 26 U.S.C. 7604. The Plaintiff below in all causes was the

Internal Revenue Service seeking enforcement of summonses and demanding the physical turn over of the original, personal records of Charles and Marion Hefti, then residents of the Eastern District of Missouri. The summonses were for the tax years 1983, 1984, and 1985. The appeals from the orders of the District Court to the United States Court of Appeals, Eighth Circuit, were based under its general appellate jurisdiction conferred by 28 U.S.C.A. 1291.

Reasons for Granting the Writ

I. Whether the Eighth Circuit Court of Appeals by failing to render an opinion on a question of constitutional dimension properly before it, as clearly shown by the record, so far departed from the usual course of judicial proceedings so as to deny Petitioners of their constitutional rights, and so as to call for this Court's power of supervision to correct the error.

The appeals herein arise out of final,

appealable orders of the District Court of the Eastern District of Missouri enforcing IRS summonses directed to the Heftis to produce records under 26 U.S.C. 7602 and ordering the Heftis to "turn over" custody and control of their original, personal, and business records to the IRS for the tax years 1983, 1984, (Appendix 3) and 1985 (Appendix 18).

This writ involves two separate cases which were designated as 88-1838 and 88-2088 and which were consolidated on appeal on motion of the Government (Appendix 46). They were heard jointly and the opinions dealt with them jointly and the orders were entered as to both cases.

In 88-1838 the appeal was from District Court Judge Filippine's new, final order of April 6, 1988 (tax year 1985), wherein Defendants were told that "production of records," meant to "turn over" their original books and records to the Internal Revenue Service (Appendix 30) and so ordered that

the Defendants turn over physical possession and custody of their original records to the Internal Revenue Service. The order was properly and timely appealed by the Appellants, pro se (Appendix 51).

In Appeal No. 88-2088 an order was issued by Judge Nangle on February 19, 1988, ordering Appellants to produce their records. Appellants complied on March 15, 1988, by bringing in and offering their original records to the IRS for examination and photocpying. The IRS was not satisfied with these offers and demanded that Appellants "turn over" physical control of their original, personal, and business records. The matter was transferred from Judge Nangle's Court and, therefore, called before Judge Gunn on a show cause order on July 13, 1988. Judge Gunn ruled that the Appellants had "substantially complied with Judge Nangle's February 19, 1988, order," but also found that they were "collaterally estopped" by Judge Filippine's order of April 6, 1988,

issued in a different cause and Judge Gunn, therefore, found them to be in contempt from April 9, 1988, until June 24, 1988, and fined them $38,000.00 to be paid within ten days. It was further ordered at that time that Defendants "turn over" physical custody and control to the IRS of their original books and records for the years 1983 and 1984 or be incarcerated (Appendix 17). This was the first time this specific order was issued for the 1983 and 1984 tax years. The judgment order was timely appealed by the Defendants pro se (Appendix 51).

As noted by the Appellate Court, the chief bone of contention for the sake of which Defendants were willing to face incarceration and pay the fine to prevent the issue from becomming moot, is whether the word "produce" records for examination in 26 U.S.C. 7604(a) means "make available" or means "turn over" physical control and custody to the IRS with no safeguards (Appendix 55).

The Appellate Court then stated that it did not need to resolve the question, does "produce" original records mean "turn over" control of original records; that the District Court had ordered the records "turned over;" that said ruling constituted the law of the case; that Appellants' proper course was to appeal from, not to flaunt the decision of the lower court (Appendix 57). This factual conclusion of "no appeal" as stated by the Appellate Court is completely contrary to the record in the case. The record shows that the Appellants, for good cause shown, promptly and properly appealed both orders and never flaunted the decision of the courts (Appendix 51 and 51).

The Appellate Court later went on to state "obviously it was the obligation of the Heftis to appeal to this Court if they were unwilling to acquiesce in the unequivocal rulings of the Court" (Appendix 61). In making this statement, the Appeals Court overlooked or completely misinterpreted

the facts as set out in the record. Appellants did not acquiesce in the ruling of the Trial Court and did in fact promptly and properly appeal both final orders.

The Appellate Court was preoccupied with upholding the contempt order of Judge Gunn and the power of the Court to enforce orders and injunctions citing United States v. United Mine Workers, 330 U.S. 258, and completely ignored the rights of Defendants to appeal from final orders and to have a decision rendered on their appeal.

There is necessarily a counterpart to the well established insistence that commands be obeyed and that counterpart is that persons are entitled to obtain a definitive disposition of their objections (on appeal). Pasadena City Board of Education, et al. v. Nancy Lee Spangler, 427 U.S. 424.

Appellants, pro se, had appealed Judge Nangle's order of February 19, 1988, and subsequently, in error, dismissed that appeal (Appendix 37). In attempting to construe

the Appellate Court's meaning, the Heftis thought that the Appeals Court was holding that the Appellants should have appealed Judge Nangle's enforcement order and should have pursued that appeal to its end or that, alternatively, they should have appealed Judge Nangle's order at the time Judge Filippine entered his order in a different case. Because the Appellate Court cited United States v. Rylander, 460 U.S. 752, we must guess that the Appellate Court meant that Appellants should have raised their objection at the enforcement hearing in Judge Gunn's court. (The case was transferred from Judge Nangle's Court to Judge Gunn's Court.) However, the issue at the contempt hearing was, as instructed by Judge Gunn, "production" and not "turning over" and whether or not the Heftis complied with Judge Nangle's order of February 19, 1988. Judge Nangle ordered the Appellants to "produce for examination the relevant ledgers, etc." (Appendix 1) (which the Heftis did on March

15, 1988, and subsequently again agreed to do). The issue of "turn over" was not involved in the enforcement hearing, but was raised by the IRS in a subsequent, unannounced contempt hearing referred to earlier. There was nothing in Judge Nangle's February 19, 1988, order that related to "turn over" that would be appealable. There is the alternate proposition that the Court meant that the Heftis should have appealed or filed an appeal on the 1983 and 1984 (No. 88-2088) cases when Judge Filippine issued an order on the 1985 (No. 88-1838) case. We are, frankly, at a loss as to "what" and "when" the Heftis should have appealed as suggested by the Appellate Court opinion. These issues were raised on motion for rehearing, but the Appeals Court overruled Appellants' motion for rehearing without comment. We must assume that the Appellate Court did not consider Judge Nangle's original order "to produce" but rather only Judge Gunn's order

of July 13, 1988, which, for the first time in the tax years 1983 and 1984, called for "turning over" of books and records, which was a material and substantial change from the original order. For this reason, that order should be considered as a separate, final order and properly appealable as a new and distinct order.

The final order of the Appellate Court affirms the judgments of the Trial Courts in both cases. It, therefore, affirms Judge Filippine's order that "production" of records means to "turn over" original records. Yet, the Court specifically states that it is not deciding that issue. The appellate judgment is contradictory of the appellate opinion. Likewise, in Judge Gunn's case, the Court affirms the contempt which was solely based on Judge Filippine's order in a different cause, which was on appeal, and the order to "turn over" the records. In affirming the orders of the Trial Court in both cases, the Court is deciding that

which it says it does not need to decide to render an opinion. This case stands for a de facto ruling that in the Eighth Circuit an IRS agent can cause an administrative summons to be issued demanding citizens to turn over possession and control of their personal and business records and the original of same without condition, assurance of integrity, or indemnity. For a taxpayer to refute this would be to cause him to expend monies in litigation and be ultimately faced with considerable legal expenses. A lower court would be faced with an appellate opinion which would for all practical purposes require the upholding of the issuance of the summons and the "turning over" of the taxpayers' original records.

If the Appellate Court felt that the Appellants should have followed up on their original appeal of Judge Nangle's February 19, 1988, order, the Court should have reinstated the Heftis' appeal set forth by Appellants' motion to reinstate. Perhaps

Appellate Court felt they should have filed a separate appeal in No. 88-2088 (tax years 1983, 1984) after Judge Filippine's "turn over" order in No. 88-1838 (on 1985 taxes), and assuming the same for argument purposes, that yet does not explain the 1985 tax case with Judge Filippine in which no contempt was found. In that case, there is no question whatsoever that a timely appeal was specifically taken on the point at issue, e.g., does "produce" original records mean "turn over" custody and control of original records, and was clearly and properly before the Appeals Court. The Appeals Court ignored that fact.

We could argue perhaps that there was no decision as to Judge Filippine's case because the Court said it need not decide the question of "turn over," but it can also be argued that there was, in fact, a decision on the Filippine case. The Court did affirm the order of Judge Filipine to turn over the records. It thus decided that which "it need

not decide." It is a decision wherein the Appellate Court rules on a point at issue it says that it is not ruling upon and which it has no need to rule upon. Further, the Filippine case (No. 88-1838) was used as the sole means to arrive at the contempt finding in the Gunn case (No. 88-2088) -- which the Eighth Circuit affirmed.

We feel that the Appellate Court, in its zeal to affirm the power of the lower court, frankly overlooked the companion case and the clear cut record on the same.

This is a case of extraordinary importance because it involves every U. S. citizen and each citizen's relationship to the IRS. It is a case wherein two taxpayers were incarcerated after their taxes were assessed by the IRS, with total disallowance of all exemptions (Appendix 67) and paid (Appendix 74) on the premise that the IRS needed to take possession and control of the Heftis' original, personal, and business records in order to perform a routine audit.

There was obviously no need for the IRS to take possession of original records to perform a routine audit. The taxes had been determined, petitioned to the Tax Court (1983), and paid in full (1984 and 1985). It is a situation wherein the actions of the IRS in pursuing their point with no legal foundation can only be called punitive and harassment, and wherein the lower courts were misled by the IRS and caused to assist in this outrageous outcome.

Unequal treatment of citizens is not allowed. U. S. Constitution Amendment XIV. Unequal treatment of taxpayers is not condoned by the United States Supreme Court. United States v. Gilmore, et al., 83 S.Ct. 623 (1963), where the Court clearly states that courts should be slow to attribute to Congress purpose producing unequal treatment among taxpayers and resting on no rational foundation.

The question of warrantless seizure raised by the case goes to the heart of the

Fourth Amendment. "Indeed, one of the primary evils intended to be eliminated by the Fourth Amendment was the massive intrusion on privacy undertaken in the collection of taxes pursuant to general warrants and writs of assistance." G. M. Leasing Corporation v. United States, 429 U.S. 338.

An administrative summons, backed by the Appellate Court decision, amounts to a writ of assistance or general warrant, for to resist the same would be to invite further harassment and legal expense with little expectation of relief from the lower courts, which courts should be the independent balancing factor in the enforcement of summonses.

The Appellate Court opinion shows a clear misunderstanding of the case based on the record. It is a bad opinion legally, that departs from the usual course of judicial proceedings and denies the Defendants of their constitutional right to

be secure in their persons and papers, denies defendants equal protection of the laws, and to have a right to appeal so as to call upon this Court's power of supervision to correct this miscarriage of justice.

We ask, therefore, that this Court issue its writ to bring this matter forward for further briefing and orders.

II. Whether Petitioner can be forced in a civil case to "turn over" possession, custody, and control of original business and personal records to the IRS by their issuance of an administrative summons to produce records for audit. Whether such action amounts to a general warrant or writ of assistance and illegal seizure under U. S. Constitution Amendments Four and Fourteen.

On April 6, 1988, on the 1985 tax return, Judge Filippine issued a memorandum and order and he noted that the Respondents

had failed to comply but that because Respondents appeared pro se and to assure that their non-compliance was not due to a misunderstanding, he offered additional explanation. He noted that the Respondents contended that the word "produce" in the summonses requires that they "present" records for inspections but not that they "turn over" these records. He noted also that the Petitioners, the IRS, on the other hand, sought possession and control of the original records for examination and indicated at the hearing that it would take them about a week to examine and photocopy the records and return the originals to the Respondents. He, therefore, ordered that the Respondents were directed to comply with the Court's November 13, 1987, orders and to obey the summons previously issued. Respondents were specifically directed to produce for examination, by "turning over" the originals, the items requested in the summons dealing with the calendar year ending

December 31, 1985, on or before April 11, 1988.

This was the order appealed from (No. 88-1838). The order is clear and unequivocal and requires Respondents to "produce" by "turning over the originals." This had been the bone of contention between the IRS and the Respondents from the beginning. The IRS had repeatedly demanded the turning over of documents and Respondents refused to do so because of prior problems of damaged records by the IRS. This was the first explicit order of the lower court that ruled "produce" means "turn over" the physical custody and possession of original business and personal records to the IRS without any qualification. The Respondents had refused to turn over original records based on partial destruction of their business records turned over to the IRS for the tax years 1980, 1981, and 1982. They presumed a similar fate to their 1983, 1984, and 1985 records if turned over to the IRS. They felt

strongly that "production" did not equal "turning over" the original records. They then did what the Appellate Court says they didn't do. They timely filed their appeals in this matter on this specific point.

The lower court had based its ruling in reliance on United States v. Davey, 543 F.2d 996. The Heftis on appeal argued that said case was inappropriate because it dealt with original computer tapes generated from the original records themselves that were required by the IRS to be kept in the specific case under the tax regulations and did not call for the turning over of any original business records.

The matter was extensively briefed by both sides. Heftis were able to come up with the case of Chapman v. Goodman, 219 F.2d 802, which specifically ruled that "produce" does not mean "turn over." The Heftis also emphasized the "good faith" requirements called for by United States v. Lass, 587 F.2d 929, and the basic requirements of a summons

as set out in United States v. LaSalle National Bank, 437 U.S. 298. The Appellate Court notes in its opinion that on the merits of this particular issue (turn over), the Government concedes that there are no reported cases directly on point (Appendix 56).

Appellate Court relied on United States v. United Mine Workers, 330 U.S. 258, and on Couch v. United States, 409 U.S. 322. While no one disputes the preeminence of the Courts on statutory interpretation as opposed to the individual, the question of the conclusion reached by the Court that Couch applies is incorrect. The Court states in its opinion that "nor does the issuance of a deficiency notice -- terminate the validity of a summons under 28 U.S.C. 7602(a)" (Appendix 62), relying on Couch, supra, as authority.

What Couch stands for is that a taxpayer cannot avoid a summons by his actions and that a summons valid when issued can be

enforced regardless of subsequent changes made by the taxpayer.

Here, the subsequent actions and changes were by the IRS and not the taxpayer. The IRS under its statutory powers issued a Form 1099 on December 7, 1987, fully and finally determining the tax liability for the tax years 1983, 1984, and 1985, totally disallowing all claimed deductions, including statutory deductions. Once issued, the tax laws are such that a taxpayer can only (1) pay and seek no recourse, (2) appeal to the Tax Court, (3) pay and file a claim for refund, (4) wait for the Government to seize property. The IRS then, by its own actions (issuance of the 1099 Notice of Deficiency for 1983, 1984, and 1985), changed the legal basis behind the summonses, to-wit, that it needed the records to determine the tax liability. Further action on its part necessarily brings in the question of good faith needed for the Court to maintain jurisdiction required by the cases noted

above and United States v. Powell, 379 U.S. 48.

It is the Defendants' contention that the actions of the IRS subsequent to December 7, 1987 (the date the IRS issued a 1099 for all three years in question) constituted nothing more than harassment. It was the IRS that changed the original validity of the original summonses and not the Heftis. This constitutes a totally different set of facts than those found under Couch, supra. We state that Couch simply does not apply and that the Court's reliance on the same is misplaced.

The Heftis under the circumstances chose to appeal the 1983 tax to the Tax Court (Appendix 72) and paid the 1984 and 1985 taxes on August 8, 1988 (Appendix 74). They have retained their rights to seek refunds on the 1984 and 1985 cases.

However, none of this resolves the basic issue before the Court which the Court said it need not decide (Appendix 56). The

Appellate Court said it was the proper course to appeal from, not to flaunt the orders of the District Court (Appendix 57). We have demonstrated that the Heftis did appeal from both final "turn over" orders, and the record shows that the issue was squarely before the Court.

We argue that the Appellate Court's opinion is erroneous and that the ruling as issued represents a "de facto" ruling on this issue based without case law or legal opinion on its part and that this Court must, therefore, decide the matter which is the principal issue in this case, to-wit, do the words "and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry;" mean that the IRS can demand that those original books, records, and papers be turned over to them and that physical custody and control of those original records be given to them in a civil case such as this, without further

condition or without invocation of any of the equitable powers of the Court.

We pray, therefore, that this matter be brought to this Court by writ so that the point may be further briefed and this Court may render a decision thereon.

III. Whether the Eighth Circuit Court of Appeals in affirming the lower court's contempt order sanctioned a departure by the lower court so far removed from the usual course of judicial proceedings and denying Petitioners of their constitutional rights so as to call for this Court's power of supervision to correct such error.

(a) Whether a district judge can hold a party to be in contempt based upon his re-interpretation of the order of another judge utilizing the reasoning of collateral estoppel and not based on the wordage of the original order at a time when the related order was properly on appeal.

The primary purpose of the opinion was to uphold an order of contempt issued on July 13, 1988, by Judge Gunn on the 1983 and 1984 tax years based on an order in another court wherein the Court held them in contempt, fined them $38,000.00 and ordered them to "turn over" their records to the IRS within ten days (Appendix 17).

This litigation was commenced by the Government on September 2, 1986, when two separate actions were filed for the enforcement of a summons for tax years 1983 and 1984 (No. 88-2088). Subsequently, on June 22, 1987, a separate action was filed to enforce summons for the year 1985 (No. 88-1838).

On September 28, 1987, and on February 19, 1988, Judge Nangle issued his orders for the 1983-1984 case that Respondents "be and are directed to produce for examination the relevant ledgers, journals, summaries, books of entry, invoices, and other records on or

before March 15, 1988" (Appendix 3).

On March 15, 1988, a meeting was held at the IRS office wherein the Heftis produced their records for the tax years 1983, 1984, and 1985 and offered to allow the IRS to examine and photocopy their original records. The IRS and the Heftis electronically recorded the meeting. The transcript of said meeting was produced into evidence by the Heftis at the contempt hearing of July 1, 1988, and is part of the record. The nature of this meeting has been disparaged by the Appellate Court, but, in fact, as shown in the record on appeal, the IRS "refused" to inspect or photocopy the documents and/or arrange other meetings with the Heftis demanding that the documents be "turned over" to them.

On March 25, 1988, the IRS brought up the matter of the 1985 taxes before Judge Filippine (No. 88-1838) alleging that the March 15, 1988, meeting was unsatisfactory because the Heftis would not turn over their original records and, therefore, the Heftis

remained in non-compliance with Filippine's order of November 13, 1987. Judge Filippine, acknowledging the Heftis pro se position, and to make sure that there was no misunderstanding, wrote a memorandum and order dated April 6, 1988, wherein it was stated, "Respondents are directed to produce for examination by turning over the originals, the items requested in the summonses." It was further ordered that if the Heftis failed to comply by April 11, 1988, they will be in contempt of Court and fined the sum of $50.00 per day (Appendix 30). Motions by the Heftis were denied, and on May 27, 1988, notice of appeal was filed (No. 88-1838).

Stymied by the appeal, the IRS next turned to Judge Gunn on tax years 1983 and 1984 (No. 88-2088). The case had been transferred from Judge Nangle to Judge Gunn. A hearing was held in Judge Gunn's court on July 1, 1988, wherein the IRS again alleged non-compliance at the March 15, 1988, meeting because the Heftis would not relinquish

control and custody of their original records to the IRS. The result was the judgment and order first referred to. Judge Gunn in his opinion stated that the Heftis had "substantially complied with Nangle's order of February 19, 1988" (Appendix 14), but the Court went on to rule that it found that the Heftis did not comply with the February 19, 1988, order after they received notice of Judge Filippine's order of April 6 on the 1985 tax case. The Court completely overlooked the fact that Judge Filippine did not hold Petitioners in contempt and that the order of Judge Filippine had been appealed. It went on to find that a $500.00 per day fine be levied from three days after the Filippine order, April 9, 1988, to June 24, 1988 (the original hearing date), for a total of $38,000.00 (Appendix 16). The Court also ordered that Heftis obey the summons and that "compliance shall consist of producing for examination the items described in the summons by turning over to

the IRS the relevant ledgers, journals, etc." (Appendix 17A).

Thus, in one stroke, the Court found Defendants guilty based on another Judge's order in a separate case on appeal, and changed the original order of Judge Nangle to a substantially and materially different order requiring the "turning over of original documents."

In reaching this curious conclusion, Judge Gunn held that the Heftis were "collaterally estopped" from contending that their actions in the March 15, 1988, meeting with the IRS constituted compliance (Appendix 12).

In effect, Judge Gunn ruled that the order of Judge Nangle of February 19, 1988, was changed by the order of Judge Filippine in another cause to read "turn over." It was a retroactive or ex post facto application of an order as he saw it. Yet, suppose that the Heftis attempted an appeal to the Appellate Court on the 1983 and 1984

taxes after the separate order in the separate case by Judge Filippine, based on the theory that the ruling of Judge Nangle had now been changed and must be appealed. No Appellate Court in the land would have allowed such an appeal. Yet, this appears to be the Trial Judge's as well as the Eighth Circuit Court of Appeals' position, that is that the Defendants should have timely filed an appeal.

The Trial Judge's reliance on collateral estoppel is wholly misplaced and an appalling application of the law.

Under collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation. Montana v. United States, 440 U.S. 147, and Park Lane Hosiery Company v. Shore, 439 U.S. 322. That doctrine of collateral estoppel is treated closely with the doctrine of res

judicata, and it is utilized for preventing or barring further claims by parties based on the same cause of action. Cromwell v. County of Sacramento, 940 U.S. 351.

First of all, the Government brought these suits and brought them as separate causes of action. Secondly, the 1983 and 1984 case (No. 88-2088) was brought prior to the 1985 case (No. 88-1838). If this doctrine applied, then Judge Filippine could be estopped from changing Nangle's order. Thirdly, there was no final determination of the 1985 order, which fact was simply ignored by Judge Gunn. Fourthly, this is not a subsequent action in any way brought by the Heftis to relitigate the matter. The doctrine simply doesn't apply, and we were appalled that a District Judge should so construe the law and that an Appellate Court should back such thinking.

There was the notion in the Appellate Court that the Heftis were flagrant violators of the Court's orders. We submit that the record proves otherwise. The Appellate Court

was upset with the "evils of pro se litigation." We would state that if it is "evil", it is nonetheless a constitutionally protected "evil." Both the Trial Judge and the Appellate Court contend that the Heftis should have submitted to the inevitable and turned over their original, personal, and business records. Even the preliminary opinion of the Appellate Court relative to the removal of the stay order virtually admonished them to pay the fine and turn their original records over to the IRS (Appendix 44). To do this would have immediately "mooted" their appeal, United States v. Orlowski, 808 F.2d 1283 (8th Cir. 1986), and this the Heftis refused to do. Their refusal to "turn over" their original, personal, and business records ultimately placed them in jail and caused them to pay a fine of $38,000.00 into the registry upon the sale of their home in October of 1988. While these points were raised and considered in the appeal, we do not specifically make it a point herein, since it seemed the

logical consequence of Judge Gunn's July 13, 1988, order, and if said order is rescinded, as it should be, the question will be resolved to the satisfaction of the Petitioners.

Appellate Court said Heftis should do what they were ordered to do or appeal. They were ordered to turn over their 1985 records. They appealed. They were held in contempt on their 1983-1984 records and then ordered to turn over their records. They could not have appealed that which they had not been ordered to do prior to that time. The Heftis could only appeal what was done to them.

It is the Petitioners' position that the actions of the lower court were such a departure and so far removed from the normal course of judicial proceedings, together with the Appellate Court's affirming such actions, as to call for intervention by this Court and the exercise of its powers of supervision to correct this excessive and unwarranted usage of the Court's powers of contempt. A finding of contempt can only be based on

the plain wordage of a specific order and a finding of a specific violation of that order. It cannot be based on what a judge thinks people know or how they should behave.

We ask, therefore, that the Court issue its writ bringing this matter before it so that the injustice cited herein can be corrected.

IV. Whether the Trial Court lost jurisdiction on the 1983 tax case when same was petitioned to the Tax Court. Whether the IRS lost its basis of good faith needed for enforcement of summonses after it assessed taxes for 1983, 1984, and 1985 under a Form 1099, and whether the IRS lost its basis of good faith needed for enforcement of summonses after Petitioner allowed IRS to inspect and photocoopy original records for 1983, 1984, and 1985.

A deficiency (1099) was issued by the

IRS against the Heftis on December 7, 1987, for the years 1983, 1984, and 1985. A copy of said assessment is attached hereto (Appendix 67). This notice indicates that the IRS has determined finally and fully the tax due for the years in question.

Once the IRS sends this 90-day letter, your taxes have been determined. You can either pay the taxes; appeal the assessment to tax court; pay the taxes and file for reimbursement; or be subject to levy and attachment.

The issuance of this document came during the course of litigation and prior to the actions complained of herein, e.g., Gunn's order issued on July 10, 1988.

After receiving this document of assessment, the Heftis appealed their 1983 tax to the United States Tax Court on March 3, 1988 (Appendix 72). On March 15, 1988, the Heftis appeared before the IRS with their 1983, 1984, and 1985 original records and offered to let the IRS examine and photocopy

them. The IRS refused. On August 8, 1988, Heftis paid the taxes, penalties, and interest in full for 1984 and 1985 based on a loan against their residence (Appendix 74).

At the time of the hearing in Judge Gunn's Court (No. 88-2088), and at various times prior thereto, the question of jurisdiction was raised by the Heftis. Specifically, it was pointed out that the 1983 tax was petitioned to the Tax Court and that the jurisdiction of production of documents and records had been lost by the District Court and assumed by the Tax Court. Under Russell v. United States, 592 F.2d 1069 (C.A. Oregon), cert. denied, 100 S.Ct. 308, the Heftis were correct. There are other cases supporting this position not cited herein.

The Trial Court and Appellate Court both totally ignored this precedent and argument.

The Appellate Court, as noted in a prior point, used Couch v. United States, supra,

to make the statement that a deficiency notice does not terminate the validity of a summons implying that it was necessary for purposes of the statute of limitation. Actually, the statute of limitations had run on the 1983 taxes but not on the 1984 or 1985 taxes. Also, the IRS instituted and controlled the litigation, not the Heftis.

As we pointed out, the Court's reliance on Couch is misplaced. Couch is not authority for the premise that a Notice of Deficiency issued by the IRS does not terminate a summons. It is authority for the fact that a taxpayer cannot commit actions after the issuance of a summons for the purpose of defeating a summons. Here, the action was by the IRS and not by taxpayers. That action is so powerful as to change the legal status of the parties. There is no longer a question of "how much," only a question of "pay" or you, Mr. Taxpayer, shoulder the burden of proof and prove to us by the preponderance of credible

evidence why you should not have to pay. All of this is within the statutory authority of the Commissioner as upheld by the Courts.

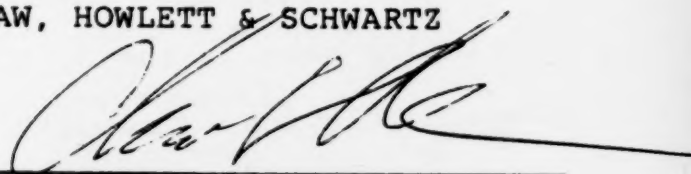
Our point is that the 1099 Notice of Deficiency is not an incidental thing as treated by Appellate Court. The Heftis have at all times claimed as part of the lower court's records that once this 1099 was filed, the lower courts lost the basis of their jurisdiction for enforcement of a summons for the reason that the good faith requirement of United States v. Powell, 379 U.S. 48, 85 S.Ct. 248 (1964), could no longer be met after the assessment by the IRS. The purpose of an administrative summons is to assess the tax. The reason for the order ceased to exist because the taxes had been assessed, and, therefore, the order must cease to exist.

The Trial Court and Appellate Court ignored these arguments. We think that it is time to review Powell, supra, under current practices and this issuance of a

1099, and to make a determination as to what duty, if any, the issuance thereof places on the IRS. We state that it was the IRS's duty to inform the Trial Court of its issuance, and for the Trial Court to dismiss the cause based on such information.

We ask, therefore, that this Court issue its writ to bring this matter to this Court for review, briefing, and decision thereon.

SHAW, HOWLETT & SCHWARTZ

By 

Charles M. Shaw
Attorneys for Appellants
168 N. Meramec, Suite 150
Clayton, Missouri 63105
(314) 725-9700

Certificate of Service

Charles M. Shaw, of lawful age, being first duly sworn upon his oath, states that he mailed three conformed copies of Petition for Common Law Writ of Certiorari to the Eighth Circuit Court of Appeals, together with Appendix thereto, to William S. Rose, Attorney, Tax Division, Department of Justice, P. O. Box 502, Washington, D.C. 20004, on the 6th day of November, 1989, by placing same in the U. S. Mail, postage prepaid, Clayton, Missouri.

Charles M. Shaw

Subscribed and sworn to before me this 6th day of November, 1989.

Notary Public

My Commission Expires:

JOAN MARIE MOFFITT
NOTARY PUBLIC STATE OF MISSOURI
ST. LOUIS COUNTY
MY COMMISSION EXP. OCT. 6,1992

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

CHARLES R. HEFTI and
MARION C. HEFTI,

Petitioners,

v.

UNITED STATES OF AMERICA, and
R. MICHAEL WILLIAMSON, and
BRENDA KESSELL, Revenue Agents,

Respondents.

APPENDIX

Charles M. Shaw
Attorney for Petitioners
168 N. Meramec, Suite 150
Clayton, Missouri 63105
(314) 725-9700

INDEX TO APPENDIX

File Stamped: February 19, 1988

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA, et al.,	)	
Petitioners,	)	
vs.	)	No. 87-1220C(1)
CHARLES R. HEFTI, et al.,	)	
Respondents.	)	

ORDER AND MEMORANDUM

On September 28, 1987, this Court granted petitioners' two petitions to enforce IRS summonses and ordered respondents to comply with the smmonses within twenty (20) days of that date. The matter is presently pending on appeal before the Eighth Circuit Court of Appeals. On January 13, 1988, the Eighth Circuit concluded that respondents had not shown any likelihood of success on appeal on the merits or any irreparable injury flowing from enforcement of the summonses now. The Eighth Circuit accordingly denied respondents' motion to stay this Court's September 28, 1987, order. The matter is now before this Court on

petitioners' renewal of petition for order to show cause why respondents should not be held in contempt for failure to comply with the September 28, 1987, order. Although this Court has not yet issued a show cause order, respondents have filed an answer to petitioners' filing. This answer constitutes a response to the show cause order which this Court would have issued. Therefore, the Court will proceed to consider on the merits whether respondents should be held in contempt of Court for their failure to comply with the Court's order of September 28, 1987.

Respondents' answer to petitioners' filing and respondents' previous filings with this Court do not contain an adequate basis for further delaying enforcement of the IRS summonses. Respondents have not shown any likelihood of success on appeal on the merits. United States v. Hefti, Nos. 87-2556, and 87-2661 (8th Cir. Jan. 13, 1988). It is time for respondents to comply with the summonses and thus to let the IRS get on with its investigation of respondents'

tax liabilities.

For the foregoing reasons,

IT IS HEREBY ORDERED that petitioners renewal of petition be and is granted.

IT IS FURTHER ORDERED that respondents Charles R. and Marion Hefti be and are directed to obey the summonses issued on July 15, 1986, and be and are directed to produce for examination the relevant ledgers, journals, summaries, books of entry, invoices, and other records on or before March 15, 1988.

IT IS FURTHER ORDERED that, if respondents fail to comply with the above order, respondents will be held in contempt of Court and will be fined the sum of $500.00 per day until such time as they do comply with the above order.

/s/ John F. Nangle
United States District Judge

Dated: February 19, 1988

File Stamped: July 13, 1988

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA and R. MICHAEL WILLIAMSON, REVENUE AGENT, INTERNAL REVENUE SERVICE,	)	
Petitioners,	)	
vs.	)	No. 87-1220C(6)
CHARLES R. HEFTI and MARION HEFTI,	)	
Respondents.	)	

MEMORANDUM

This matter is before the Court on petitioners' motion to reduce fine to judgment and for issuance of a bench warrant and on respondents' motion to dismiss order to show cause re contempt. The Court held a hearing on July 1, 1988 to consider the merits of the parties' respective motions. After considering the evidence adduced at the hearing and the arguments advanced by the parties, the Court now grants petitioners' motion and denies respondents' motion.

On July 15, 1986, Revenue Agent R. Michael Williamson, one of the petitioners herein, issued summonses to respondents Charles R. Hefti and Marion Hefti ("Heftis")

in connection with an Internal Revenue Service ("IRS") investigation into the Heftis' federal income tax liability for the taxable years ending December 31, 1983 and December 31, 1984. As the Heftis failed to comply with the summonses, petitioners filed petitions to enforce the summonses which were later consolidated into the present proceedings. On February 4, 1987, and after conducting a hearing on the issues, Magistrate Kingsland recommended that the summonses be enforced. On September 28, 1987, the Court adopted Magistrate Kingsland's recommendation and ordered the summonses enforced. Shortly thereafter, on November 3, 1987, the Court stayed enforcement of its order for fifteen days to afford the Heftis an opportunity to appeal. The Heftis appealed, and on January 13, 1988 the Eighth Circuit denied the Heftis' motion to stay the Court's September 28, 1987 order concluding that the Heftis had not shown any likelihood of success on appeal on the merits or any irreparable

injury flowing from the immediate enforcement of the summonses.[1]

Petitioners thereupon filed a motion to hold the Heftis in contempt of court for failure to comply with the Court's September 28, 1987 order. After the Heftis responded, the Court on February 19, 1988 ordered the Heftis to produce for examination the documents and records described in the summonses on or before March 15, 1988 and advised them that if they did not comply with the Court's order they would be fined $500 a day for each day thereafter for noncompliance. The Heftis then filed a motion for relief from the Court's February 19, 1988 order. On March 3, 1988, the Court denied the motion and again ordered the Heftis to produce the relevant documents and

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[1] On April 20, 1988, the Eighth Circuit granted the Heftis' motion to dismiss their appeal. However, the Heftis have since moved the Eighth Circuit to reinstate their appeal on the ground that they misunderstood the nature of their motion.

records on or before March 15, 1988, again advising them that if they did not do so they would be fined $500 a day for each day thereafter that they failed to do so. On March 21, 1988, the Heftis filed a memorandum and affidavit with the Court noting that they had complied with the Court's February 19, 1988 order by "producing for examination" the relevant documents and records described in the summonses.

Petitioners subsequently filed their motion to reduce fine to judgment and for issuance of a bench warrant as they contend the Heftis failed to comply with the Court's February 19, 1988 order. Specifically, they contend that on March 15, 1988 the Heftis appeared before the IRS and "showed" the requested documents and records, but did not permit the IRS to take custody or possession of them for the purpose of examining and copying them. The Court thereafter scheduled a hearing on June 24, 1988 to consider petitioners' motion. By request of petitioners, the hearing was subsequently

reset to July 1, 1988.

On July 1, 1988, the Court held a hearing to determine whether the Heftis complied with the Court's February 19, 1988 order.[2] The facts adduced at the hearing are uncontroverted. On March 15, 1988, the Heftis appeared at the offices of the IRS for the purpose of complying with the summonses issued in connection with the investigation into their 1983, 1984 and 1985 federal income tax returns.[3] During the

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[2] At the hearing, the Heftis appeared pro se and were permitted to present testimony and evidence to prove that they complied with the Court's February 19, 1988 order. However, after the Hefits had presented four hours of largely cumulative and irrelevant evidence, and after the Court repeatedly admonished them to refrain from eliciting legal arguments from their witnesses, the Court terminated the hearing.

[3] As described below, the summonses relating to the Heftis' 1985 federal income tax return are the subject of separate proceedings. See United States v. Marion Hefti, 87 Misc. 253 (E.D.Mo.); United States v. Charles R. Hefti, 87 Misc. 254 (E.D.Mo.).

course of their meetings, the Heftis displayed the documents and records described in the summonses to IRS agents. The Heftis asked the agents to examine and photocopy the materials in their presence but refused to turn them over to the agents. After approximately an hour of discussion, the Heftis left with all of the documents and records in their possession. They voluntarily agreed to meet with the agents at a later date, but notwithstanding subsequent requests from the agents for such a meeting, no meeting ever took place. The Heftis assert that at the time they left the meeting, they believed they had complied in good faith with the Court's February 19, 1988 order.

The summonses relating to the Heftis' 1985 federal income tax return are the subject of separate proceedings before Judge Filippine. Shortly after the Heftis' meeting with the IRS on March 15, 1988, Judge Filippine held a hearing to determing whether the Heftis' action at the meeting justified

holding them in contempt of his prior order enforcing these summonses. In his Memorandum and Order of April 6, 1988, he held that the word "produce" contained in these summonses required the Heftis to "turn over" the relevant records and documents to the IRS. As the Heftis merely "presented" the records and documents to the IRS for its inspection, he concluded that the Heftis had not complied with his prior order enforcing the summonses. See United States v. Marion Hefti, 87 Misc. 253 (E.D.Mo. April 6, 1988); United States v. Charles R. Hefti, 87 Misc. 254 (E.D.Mo. April 6, 1988). Notwithstanding Judge Filippine's Memorandum and Order, the Heftis continue to refuse to turn over to the IRS the records and documents requested in the summonses at issue here, summonses which also require the Heftis to "produce" the records and documents.

In a civil contempt proceeding of this

kind,[4] petitioners, as the moving party, bear the burden of showing by clear and convincing proof that the Heftis failed to comply with the Court's February 19, 1988 order. See United States v. Darwin Construction Co., 679 F.Supp. 531, 534 (D.Mo. 1988) (citing N. A. Sales Co. v. Chapman Industries Corp., 736 F.2d 854, 857 (2d Cir. 1984)). The burden then shifts to the Heftis to raise a defense on an appropriate ground. Id.

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[4] In Oil, Chemical & Atomic Workers Int'l Union, AFL-CIO v. NLRB, 547 F.2d 575, 581 (D.C. Cir.), cert denied sub nom. Angle v. NLRB, 431 U.S. 966 (1977), the three-stage nature of the civil contempt process is described as follows: (1) issuance of an order, (2) issuance of a conditional order finding contempt and threatening to impose a specific penalty, and (3) "exaction of the threatened penalty if the purgation conditions are not fulfilled." On September 28, 1987, the Court issued its order enforcing the summonses. On February 19, 1988, the Court issued its order finding that the Heftis had failed to comply with its September 28, 1987 order and threatening to impose a penalty if the Heftis continued to do so after a date certain. Accordingly, this constitutes the third stage of the contempt process where the Court exacts a penalty upon a finding of failure to comply with its February 19, 1988 order.

Here the Heftis assert that they acted in good faith and in substantial compliance with the Court's February 19, 1988 order.[5]

Petitioners clearly met their bruden of demonstrating the Heftis' noncompliance with the Court's February 19, 1988 order. First, and by virtue of Judge Filippine's memorandum and order of April 6, 1988, the Heftis are collaterally estopped from contending that their actions in the March 15, 1988 meeting with the IRS constitute

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[5] The Heftis do not argue that the imposition of a $500.00 per day fine is either unreasonable or arbitrary. Such a coercive fine is discretionary with the Court. Perfect Fit Industries v. Acme Quilting Co., 673 F.2d 53, 57-58 (2d Cir.), cert. denied, 459 U.S. 832 (1982). Based on the Heftis' previous reluctance to obey the Court's orders, the evident financial means of the Heftis to pay such a fine as demonstrated by its ability to obtain an irrevocable letter of credit in excess of $130,000 within weeks of the July 1, 1988 hearing, a copy of which letter is attached as Exhibit 7 to the Heftis' motion to dismiss order to show cause re contempt, and the injury to justice which further noncompliance would invite, the Court finds that the $500 per day fine is neither unreasonable nor arbitrary.

compliance with the summonses and this Court's order enforcing the summonses. Second, and even if the Heftis are not collaterally estopped, petitioners have demonstrated that the word "produce" in the summonses requires the Heftis to turn over the requested records and documents to the IRS, and not merely to present them to the IRS for its inspection.

Under 26 U.S.C. §7602, the government is authorized to obtain original records for verifying the accuracy of a taxpayer's tax return. In United States v. Davey, 543 F.2d 996, 1001 (2d Cir. 1976), the court stated:

> Section 7602 does not speak on terms of duplicates, but of the records themselves--and for a good reason--where the accuracy of a taxpayer's return is being checked, the government is entitled to use the original records for purposes of verification rather than be forced to accept purported copies, which present the risk of tampering. . . . If the taxpayer wishes to protect itself against the risk that the tapes might be destroyed in whole or in part while in the government's possession, it may do so by making duplicates before complying with the summonses.

See also United States v. Spezzano, 559 F.Supp. 631, 633 (W.D. N.Y. 1982) ("even assuming that the taxpayer has already supplied copies of all documents requested by the IRS, the government is nevertheless entitled to inspect the original documents, and such a request does not indicate bad faith"). It is thus clear that the Heftis' admitted refusal on March 15, 1988 to allow the IRS to take custody and possession of the original records and documents for the purpose of examining and copying them constitutes a violation of the summonses, and, hence, the Court's February 19, 1988 order.

However, the Court finds that the Heftis have met their burden of demonstrating that they substantially complied with the Court's February 19, 1988 order until they received notice of Judge Filippine's Memorandum and Order of April 6, 1988. To meet their burden the Heftis must show that they expected all reasonable efforts to comply with the Court's order. As stated by the Ninth Circuit, "[if]

a violating party has taken 'all reasonable steps' to comply with the court order, technical or inadvertent violations of the order will not support a finding of civil contempt." General Signal Corp. v. Donallco, Inc., 787 F.2d 1376, 1379 (9th Cir. 1986). See United States v. Darwin Construction Co., 679 F.Supp. 531, 536 (D.Md. 1988) (and cases cited therein).

At the time of the March 15, 1988 meeting with the IRS, the Heftis' presentation of the records and documents for inspection, albeit refusal to relinquish custody and possession of them, could reasonably be construed as a technical or inadvertent violation of the Court's February 19, 1988 order. Nevertheless, when Judge Filippine issued his memorandum and order, the Heftis were on notice that compliance with the summonses at issue here and this Court's enforcing order required them to turn over the original materials to the IRS. Rather than attempt to do so, the Heftis have acknowledged that they did nothing.

Accordingly, the Court finds that the Heftis did not substantially comply with the Court's February 19, 1988 order after they received notice of Judge Filippine's memorandum and order.[6]

Based on the foregoing, the Court finds that the Heftis have been in contempt of the Court's February 19,1988 order from the date they received Judge Filippine's memorandum and order until the date of the hearing on petitioner's motion. The $500 per day

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[6] The Eighth Circuit has not considered whether good faith constitutes a defense to a civil contempt proceeding, and there is a split of authority among the other circuit courts of appeals as to whether it does constitute a defense. Compare Donovan v. Enterprise Foundry, Inc., 751 F.2d 30, 38 (1st Cir. 1984) (good faith is not a defense to civil contempt) with Consolidated Coal Co. v. Local 1702, United Mine Workers of America, 683 F.2d 827, 832 (4th Cir. 1982) (good faith is a defense to civil contempt in a labor dispute back-to-work order). However, as the Court finds that the Heftis substantially complied with the Court's February 19, 1988 order, it is unnecessary to resolve the issue, since it cannot be said that the Heftis acted in good faith after they received Judge Filippine's ruling.

penalty, in accordance with Fed.R.Civ.P. 6(e), will be deemed to accrue three days after Judge Filippine entered his memorandum and order and sent a copy of it to the Heftis. As it would be unfair to penalize the Heftis as a result of the petitioners' continuance of the original hearing date, the penalty will be deemed to end as of the day of the first hearing date. The $500 per day penalty will thus be calculated from April 9, 1988 to June 24, 1988. So calculated the total amount of the penalty is $38,000. Moreover, and as a result of the Heftis' persistent defiance of this Court's orders, the Heftis will be required to pay the total amount of the penalty into the Registry of the Court and to fully comply with the summonses within ten (10) days of this date. The Heftis' failure to satisfy these conditions on the date specified shall result in the immediate issuance of a bench warrant for their arrest. The Heftis shall thereafter be incarcerated until such time as they comply with these conditions.

Dated this 13th day of July, 1988.

/s/ George F. Gunn
United States District Judge

ORDER

In accordance with the memorandum filed herein on this date,

IT IS HEREBY ORDERED that petitioners' motion to reduce fine to judgment and for issuance of a bench warrant be and it is granted.

IT IS FURTHER ORDERED that respondents' motion to dismiss order to show cause re contempt be and it is denied.

IT IS FURTHER ORDERED that respondents be and they are in civil contempt of this Court from April 9, 1988 until June 24, 1988.

IT IS FURTHER ORDERED that, pursuant to this Court's Order of February 19, 1988, respondents be and they are directed to pay into the Registry of the Court the sum of Thirty-Eight Thousand Dollars ($38,000.00) within ten (10) days from the date of this order.

IT IS FURTHER ORDERED that, pursuant

to this Court's Order of February 19, 1988, respondents be and they are directed to obey the summonses issued on July 15, 1986 and relating to the taxable years ending December 31, 1983 and December 31, 1984 within ten (10) days from the date of this Order. Said compliance shall consist of producing for examination the items described in the summonses by turning over to the Internal Revenue Service the relevant ledgers, journals, summaries, books of entry, and other records.

IT IS FURTHER ORDERED that a bench warrant issue for respondents' arrest if respondents fail to both pay the aforementioned sums and obey the aforementioned summonses within the date specified herein. Respondents shall be apprehended and shall remain incarcerated until such time as they pay the aforementioned sum and obey the aforementioned summonses.

Dated this 13th day of July, 1988.

/s/ George F. Gunn
UNITED STATES DISTRICT JUDGE

File Stamped April 6, 1988

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITES STATES OF AMERICA and BRENDA KESSEL, Revenue Agent, Internal Revenue Service,	)	
Petitioners,	)	
v.	)	No. 87MICS253
MARION HEFTI,	)	
Respondent.	)	
UNITES STATES OF AMERICA and BRENDA KESSEL, Revenue Agent, Internal Revenue Service,	)	
Petitioners,	)	
v.	)	No. 87MICS254
CHARLES R. HEFTI,	)	
Respondent.	)	

MEMORANDUM AND ORDER

A hearing was conducted before this Court on March 25, 1988 on the Court's February 26, 1988 orders to show cause why respondents Marion Hefti and Charles R. Hefti

should not be held in contempt for failure to comply with this Court's November 13, 1987 orders.

Initially, this Court will address respondents' challenges to jurisdiction and due process. At the close of the March 25, 1988 hearing, respondents, for the first time, raised the issue to the Court that they never received a copy of the petitioners' January 27, 1988 petition for order to show cause why respondents should not be held in contempt, and memorandum in support thereof. Based on this omission, respondents then state that this Court lacked jurisdiction to conduct the show cause hearing. These same contentions are also raised in respondents' March 30, 1988 motions to dismiss for lack of jurisdiction, in which they additionally contend that they were denied due process of law.

In the February 26, 1988 show cause orders issued by this Court, the Court clearly set out the events leading up to the hearing and the purpose and basis for the

hearing. Respondents do not contend that they did not receive these notices, nor do they contend that they were unaware of the purpose and basis for the hearing.

Following the issuance of the show cause orders, respondents met with Inernal Revenue Service agents on March 15, 1988. Based on that meeting, respondents, on March 21, 1988, filed with this Court a "Memorandum and Affidavit in Compliance with Court Order." Thus, the prime issue at the March 25, hearing was whether the respondents complied with this Court's November 13, 1987 orders when they met with the IRS on March 15, 1988. Both sides presented evidence in support of their positions, and for reasons set forth later in this memorandum, the Court ruled that respondents had not complied.

Despite respondents' failure to comply, the Court indicated, that because respondents appeared pro se and to assure that their noncompliance was not due to a misunderstanding, that it would extend the time period for compliance to April 11, 1988.

The Court further indicated that respondents would not be held in contempt unless they failed to comply by April 11, 1988.

The Court ruled at the hearing that it had jurisdiction over the parties and the cause. The purpose of the hearing was clear and respondents never indicated otherwise. Respondents appeared to present evidence in support of their position, and the Court freely and fairly permitted them to do so. The Court, therefore, afforded respondents due process in which to present their case. Based on the testimony and evidence presented at the hearing, the Court orally detailed its findings of noncompliance. The Court then ordered respondents to turn over their original documents to the petitioners and otherwise comply with the November 13, 1987 orders on or before April 11, 1988. The Court clearly indicated that failure to comply would result in a finding of contempt and the imposition of a fine. The Court did not, however, indicate the amount of the fine at that time. Therefore, to avoid any

misunderstanding, the Court is issuing this written memorandum and order.

This Court has jurisdiction over these actions pursuant to 28 U.S.C. §1331, 26 U.S.C. §§7401, 7402(b) and 7604(a).

On June 22, 1987, petitioners filed in this Court "Petition[s] to Enforce Internal Revenue Service Summons" to compel respondents to comply with IRS summonses issued February 17, 1987. The summons provided in part as follows:

> You are hereby summoned and required to appear before Brenda Kessel, an officer of the Internal Revenue Service, to give testimony and to bring with you and to produce for examination the following books, records, papers, and other data relating to the tax liability or the collection of the tax liability or for the purpose of inquiring into any offense connected with the administration or enforcement of the internal revenue laws concerning the person identified above for the periods shown.

The summonses then detailed the items sought to be produced, all of which relate to the taxable year ending December 31, 1985.

By order dated November 13, 1987, this Court orders respondents to comply with the IRS summonses on or before November 20, 1987.

Respondents did not comply with the orders and on November 19, 1987, filed motions for stay of judgment, which this Court denied on December 4, 1987. In the December 4 orders, the Court also denied respondents' motions to set aside order and to amend findings and make additional findings, to reopen for motion to dismiss for failure to state a claim, to reopen for motion to dismiss for lack of jurisdiction, and to reopen record to include petitioners' answer.

Following the December 4, 1987 orders, respondents did not comply with the November 13, 1987 orders, and on December 14, 1987, respondents filed an appeal from the December 4 orders.

On January 13, 1988, the United States Court of Appeals for the Eighth Circuit denied respondents' motions to stay this Court's November 13, 1987 orders.

Following the appellate court decision, the respondents did not comply with this Court's November 13, 1987 orders.

Petitioners then moved for an order to show cause why respondents should not be held in contempt. Show cause orders were issued by this Court February 26, 1988 and a hearing thereon was scheduled for 9:30 a.m. on March 25, 1988. Copies of the orders were mailed to the respondents on February 26, 1988.

On March 4, 1988, respondents filed motions for relief of this Court's November 13, 1987 judgment or order.

In addition, sometime between March 16-18, respondent Marion Hefti appeared ex parte before this Court during morning informal matters to inform the Court of respondents' compliance with the November 13, 1987 orders.

On March 21, 1988, respondents filed a "Memorandum and Affidavit in Compliance with Court Order," stating that on March 15, 1988 they appeared at the office of the Internal Revenue Service, 200 South Hanley Road, St. Louis, Missouri, "to fully comply with the Order of the said Court."

At the March 25, 1988 show cause hearing, respondents appeared pro se and

presented testimony and evidence to establish that they complied with the Court's November 13, 1987 orders when they appeared at the Internal Revenue Service offices on March 15, 1988. According to the testimony of both sides, respondents did appear with their 1985 records on March 15, 1988, but refused to turn over the records to petitioners or to leave them with the petitioners. Respondents also indicated a willingness to return with the records subsequently to the IRS office, until petitioners gathered all essential information from the records.

Respondents contend that the word "produce" in the summonses requires that they "present" records for inspection, but not that they "turn over" those records. Petitioners, on the other hand, seek possession of the records for examination, and indicated at the hearing that it would take them about a week to examine and photocopy the records and return the originals to the respondents.

According to case law, 26 U.S.C. §7602

authorizes the government to obtain original records for verifying the accuracy of a taxpayer's tax return. In United States v. Davey, 543 F.2d 996, 1001 (2d Cir. 1976), the court stated:

> Section 7602 does not speak on terms of duplicates, but of the records themselves - and for a good reason. Where the accuracy of a taxpayer's return is being checked, the government is entitled to use the original records for purposes of verification rather than be forced to accept purported copies, which present the risk of tampering.
> ....
> If the taxpayer wishes to protect itself against the risk that the tapes might be destroyed in whole or in part while in the government's possession, it may do so by making duplicates before complying with the summons.

See also United States v. Spezzano, 559 F.Supp. 631, 633 (W.D. N.Y. 1982), where the court, relying on Davey, held that "even assuming that the taxpayer has already supplied copies of all the documents requested by the IRS, the government is nevertheless entitled to inspect the original documents, and such a request does not indicate bad faith." See also McGarry v. Riley, 363 F.2d 421 (1st Cir. 1966).

At the hearing, however, respondents

argued that pursuant to 28 U.S.C. §7605, they should not be required to submit their records for any additional examinations. That section provides:

> No taxpayer shall be subjected to unnecessary examination or investigations, and only one inspection of a taxpayer's books of account shall be made for each taxable year unless the taxpayer requests otherwise or unless the Secretary, after investigation, notifies the taxpayer in writing that an additional inspection is necessary.

Respondents claim that because they appeared at the IRS office on March 15, 1988, ready to "produce" their records for inspection, that they may not be required to do so again, according to this statute.

However, despite their claims to the contrary, this Court finds that respondents still have not complied with this Court's November 13, 1987 orders. According to the case law, respondents are required to physically turn over the original documents and records requested, and not merely "present" the records. Therefore, the actions of the respondents on March 15, 1988 did not constitute compliance and 26 U.S.C.

§7605 does not apply. Furthermore, their willingness to return with the records subsequently to the IRS office, rather than turn over the records, is simply not practical.

Finding that respondents have continuously failed to comply with the Court's November 13, 1987 orders, this Court orders them to turn over their original documents to the petitioners on or before April 11, 1988, after which failure to comply will result in a finding of contempt and the imposition of a fine.

In the February 26, 1988 orders granting petitioners' motion to show cause why respondents should not be held in contempt, this Court stayed ruling on petitioners' request for sanctions, costs and attorney's fees. Such an award is routinely granted in civil contempt proceedings. Quinter v. Volkswagen of America, 676 F.2d 969, 975 (3d Cir. 1982); Dow Chemical Company v. Chemical Cleaning, Inc., 434 F.2d 1212, 1215 (5th Cir. 1970); McGuffin v. Springfield Housing

Authority, 662 F.Supp. 1546, 1548 (C.D. Ill. 1987). Therefore, should respondents fail to comply by April 11, 1988, this Court will, in addition to a fine, impose costs and reasonable attorney's fees. However, rather than grant petitioners' request at this time, this Court will wait until April 11, 1988 to rule on petitioners' request. At that time, if respondents do not comply, petitioners shall submit to the Court affidavits and other relevant evidence indicating the number of hours expended on this case, how they were expended and why they were necessary, the hourly rates charged by the attorney and why those rates are reasonable, and the prevailing market rate in the community. In the event that respondents do not comply and petitioners file such documentattion, respondents shall be permitted to respond by following the procedures set forth in Local Rule 7.

Accordingly,

IT IS HEREBY ORDERED that respondents Marion Hefti and Charles R. Hefti are

directed to comply with this Court's November 13, 1987 orders, and obey the summonses issued February 17, 1987. Respondents are directed to produce for examination, by turning over the originals, the items requested in the summonses dealing with the calendar year ending December 31, 1985, on or before April 11, 1988.

IT IS FURTHER ORDERED that if respondent Marion Hefti fails to comply with the above order on or before April 11, 1988, respondent will be in contempt of Court and will be fined the sum of $50 per day until such time as she complied with the order.

IT IS FURTHER ORDERED that if respondent Charles R. Hefti fails to comply with the above order on or before April 11, 1988, respondent will be in contempt of Court and will be fined the sum of $50 per day until such time as he complies with the order.

IT IS FURTHER ORDERED that respondents' motions for relief from judgment or order and to dismiss for lack of jurisdiction are DENIED.

Dated this 6th day of April, 1988.

/s/ Edward L. Filippine
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-2088

United States of America and R. Michael Williamson, Revenue Agent of I.R.S., Appellee, v. Charles R. Hefti, Appellant.	)	Appeal from the United States District Court for the Eastern District of Missouri
United States of America and R. Michael Williamson, Revenue Agent of I.R.S., Appellee, v. Marion Hefti, Appellant.	)	

Filed August 9, 1988

Before McMILLIAN, JOHN R. GIBSON and BOWMAN, Circuit Judges.

ORDER

McMILLIAN, Circuit Judge.

On July 21, 1988, Charles R. and Marion Hefti (hereinafter taxpayers) filed a notice of appeal from a final order entered in the District Court[1] for the Eastern District of Missouri holding them in civil contempt and imposing a fine. Taxpayers also filed a motion for a stay pending appeal. On July 22, 1988, we granted a temporary stay and requested the government to file a response in opposition by July 27, 1988. Because taxpayers are appearing pro se, the court has outlined the relevant facts in some detail. For the reasons discussed below, we now vacate the temporary stay entered on July 22, 1988, and deny taxpayers' motion for a stay pending appeal. We also deny taxpayers' motion to strike the government's response as untimely filed.

Tax Years 1983 and 1984

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[1] The Honorable George F. Gunn, Jr., United States District Judge for the Eastern District of Missouri.

The Internal Revenue Service (IRS or the government) is investigating taxpayers' federal income tax liability for tax years 1983, 1984 and 1985. On July 15, 1986, IRS agent R. Michael Williamson issued separate summonses to each taxpayer to produce records and other materials relevant to the IRS investigation of tax years 1983 and 1984. IRS allowed that taxpayers did not comply with the summonses. The government then filed petitions to enforce the summonses. On February 4, 1987, after a hearing, a federal magistrate[2] recommended that the summonses be enforced. Taxpayers filed objections to the recommendation and report of the magistrate. On September 28, 1987, the district court[3] adopted the magistrate's

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[2] The Honorable Robert D. Kingsland, United States Magistrate for the Eastern District of Missouri.

[3] The Honorable John F. Nangle, Chief Judge, United States District Court for the Eastern District of Missouri. On June 7, 1988, Judge Nangle transferred the case to Judge Gunn for purposes of the contempt proceedings.

recommendation and enforced the summonses. United States v. Hefti, No. 87-1220C(1) (E.D.Mo. Sept. 28, 1987) (order). Taxpayers appealed and filed a motion for a stay pending appeal. On January 13, 1988, this court denied taxpayers' motion for a stay pending appeal on the grounds that taxpayers had not shown any likelihood of success on the merits or irreparable injury. United States v. Hefti, No. 87-2556 (8th Cir. Jan. 13, 1988) (order). The appeal was consolidated with a similar appeal involving taxpayers' records for the 1985 tax year and both appeals were dismissed upon taxpayers' motions to dismiss the appeals. United States v. Hefti, No. 87-2556 (8th Cir. Apr. 20, 1988) (order) (consolidated with appeal No. 87-2661).

Following the denial of the motion for stay pending appeal and taxpayers' continued refusal to produce their records, the government filed a motion to hold taxpayers in contempt of court for failure to comply with the district court's September 28, 1987,

order. Taxpayers filed a response in opposition. On February 19, 1988, the district court ordered taxpayers to produce their records on or before March 15, 1988, and expressly advised them that if they did not comply, they would be fined $500 per day for each day of noncompliance. Taxpayers filed a moton for relief or for reconsideration. On March 3, 1988, the district court denied the motion and again ordered them to produce the records on or before March 15, 1988, after repeating its express warning that if they failed to produce their records as ordered, they would be fined $500 per day for each day of noncompliance.

On March 15, 1988, taxpayers appeared at the IRS offices in Clayton with their records and offered to show them to the IRS agent. Taxpayers permitted the IRS agent to examine the records and to make copies, but they refused to "turn over" physical custody of their original records to the IRS. They subsequently left the IRS offices with

their original records.

On March 21, 1988, taxpayers filed a memorandum stating that they had complied with the February 19, 1988, order by "producing for examination" the relevant records. The government contended that taxpayers' conduct was not in compliance with the February 19, 1988, order and filed a motion to reduce fine to judgment and for issuance of a bench warrant. The district court scheduled a hearing on the motion for June 24, 1988; however, at the request of the government, the hearing was postponed until July 1, 1988.

Tax Year 1985

In the meantime, taxpayers were also involved in litigation about their records for tax year 1985 before another district judge in the Eastern District of Missouri. Although this litigation is not on appeal in this case, it involved similar issues. On February 17, 1987, the IRS issued separate summonses for the 1985 records, with which taxpayers refused to comply. On June 22,

1987, the IRS then petitioned for enforcement of the summonses and, on November 13, 1987, the district court[4] granted the petition for enforcement and ordered taxpayers to produce their 1985 records on or before November 20, 1987. United States v. Hefti, Nos. 87-MISC-253, 87-MISC-254 (E.D. Mo. Nov. 13, 1988) (order). Taxpayers did not comply and filed motions for stay of judgment. The district court denied taxpayers' motions for stay, to set aside and to dismiss. On December 14, 1988, taxpayers filed an appeal and a motion for a stay pending appeal, which was denied. United States v. Hefti, No. 87-2661 (8th Cir. Jan. 13, 1988) (order). As noted above, this appeal was consolidated with appeal No. 87-2556 and both appeals were dismissed upon taxpayers' motion to dismiss. United States v. Hefti, Nos. 87-2556, 87-2661

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[4] The Honorable Edward L. Filippine, United States District Judge for the Eastern District of Missouri.

(8th Cir. Apr. 20, 1988)[5].

On January 27, 1988, the government filed a petition for an order to show cause why taxpayers should not be held in contempt for failure to comply with the district court's November 13, 1987, order. The district court issued show cause orders on February 26, 1988. On March 15, 1988, taxpayers met with IRS agents in connection with their 1985 tax year records. As they had done with their 1983 and 1984 records, taxpayers "displayed" their 1985 records and allowed the IRS agents to copy them, but refused to turn over physical custody of the original records. On March 21, 1988, taxpayers filed a memorandum stating that they had complied with the November 13, 1987, order.

The show cause hearing was held on March

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[5] Taxpayers later filed a motion to reinstate each appeal. Both motions were denied on August 1, 1988.

25, 1988. At the hearing taxpayers argued that they never received copies of the show cause orders. On April 6, 1988, the district court specifically rejected taxpayers' argument that the term "produce" only required "presentation" and ordered taxpayers to turn over physical custody of their original records for tax year 1985 to the IRS by April 11, 1988, or they would be held in contempt of court and fined $50 per day. United States v. Hefti, Nos. 87-MISC-253, 87-MISC-254, slip op. at 6 (E.D. Mo. Apr. 6, 1988) (order). Taxpayers refused to comply with the district court's order and filed an appeal (No.88-1838). That appeal is still pending.

Contempt Proceedings

Notwithstanding Judge Filippine's April 6, 1988, order, expressly rejecting their compliance argument, taxpayers continued to refuse to turn over physical custody of their original records for tax years 1983 and 1984 (as well as tax years 1985) to the IRS. The contempt hearing was held on July 1, 1988.

At issue was whether taxpayers had complied with the district court's February 19, 1988, order to produce their records for the 1983 and 1984 tax years. Taxpayers appeared pro se and were permitted to present testimony and witnesses. It was not disputed that at the March 15, 1988, meeting, taxpayers displayed the records described in the summonses but refused to turn over physical custody of the records to the IRS. Taxpayers asserted that they had refused to leave their original records with the IRS because they feared the IRS would alter or destroy them. They believe that, at the time they left the IRS offices, they had complied in good faith with the February 19, 1988, order.

The district court found that, at the time of the March 15, 1988, meeting, taxpayers had substantially complied with the February 19, 1988, order to "produce" their records by merely displaying them to the IRS agents for purposes of examination. United States v. Hefti, No. 87-1220C(1), slip op. at 5-6 (E.D. Mo. July 13, 1988) (order).

However, the district court also found that, after taxpayers had received notice of Judge Filippine's April 6, 1988, order, expressly holding that they had to turn over physical custody of their 1985 tax year records to the IRS, taxpayers were on notice that the February 19, 1988, order to "produce" their records for tax years 1983 and 1984 required them to "turn over" physical custody of their original records to the IRS and that taxpayers had failed to do so. Id. at 6-7. The district court assessed a fine of $500 per day from April 9, 1988 (allowing three days for taxpayers to receive a copy of the April 6, 1988, order through the mail) to June 24, 1988 (the date the contempt hearing was originally scheduled to be held), for a total fine of $38,000. The district court ordered taxpayers to pay the fine into the registry of the court and to fully comply with the summonses, by turning over physical custody to the IRS of their original records for tax years 1983 and 1984, within 10 days of the date of the order or they would be

arrested and incarcerated until they did so.

Discussion

The standard for granting a stay pending appeal is similar to that for granting preliminary injunctive relief. A stay is an extraordinary remedy, and the decision whether to grant a stay involves consideration of the following factors: (1) whether the moving party has demonstrated a substantial probability of success on the merits on appeal, (2) whether the moving party will suffer irreparable injury unless the stay is granted, (3) whether the adverse party and other interested persons will suffer substantial harm if the stay is granted, and (4) whether the stay would serve the public interest. See, e.g., Hilton v. Braunskill, 107 S.Ct. 2113, 2118-19 (1987); Garcia-Mir v. Meese, 781 F.2d 1450, 1453 (11th Cir. 1986). The most important factor is substantial probability of success on the merits.

In support of their motion for a stay pending appeal, taxpayers argue that the

order requiring them to turn over physical custody of their original records would violate their fourth and fifth amendment rights. Taxpayers also argue it is unfair to hold them responsible under an order involving a different tax year that was issued in a different court and the $38,000 fine is unfairly harsh and arbitrary and was imposed in violation of due process. Taxpayers also argue that they are financially unable to pay the fine and, if they are arrested, their incarceration will ruin their family business and result in extreme hardship for their two children.

As a preliminary matter, we note that this is an appeal from the district court's July 13, 1988, order holding taxpayers in civil contempt. This appeal does not involve consideration of the legal validity or factual basis of the February 19, 1988, order that taxpayers failed to obey. See, Maggio v. Zeitz, 333 U.S. 56, 59 (1948).

The issue on appeal is whether the district court erred in holding taxpayers

in civil contempt and imposing a $38,000 fine. See, e.g., N. A. Sales Co. v. Chapman Industries Corp., 736 F.2d 854, 857-58 (2d Cir. 1984); Powell v. Ward, 643 F.2d 924, 931 (2d Cir.) (per curiam), cert. denied, 454 U.S. 832 (1981). In this stay proceeding, however, we need not decide the merits; we need only determine whether taxpayers have demonstrated a substantial probability that the district court erred. We conclude that taxpayers have failed to do so. There is evidence in the record that taxpayers continued to refuse to produce their records for tax years 1983 and 1984, in violation of the February 19, 1988, court order, even after Judge Filippine's April 6, 1988, order clarified the meaning of the term "produce," and that the $500 per day fine was reasonable in order to bring about their compliance with the court order and was not arbitrary.

Nor have taxpayers shown that they will suffer irreparable injury absent a stay. Taxpayers can avoid incarceration and

financial and personal hardship by paying the fine and by turning over physical custody of their records for the 1983 and 1984 tax years, as required by court order. As noted by the government in its response, the fine is to be paid into the registry of the district court. If taxpayers prevail on appeal, they can recover the fine.

Finally, the government's interest in the efficient administration of the federal tax laws and the public inerest in the administration of justice, in particular in compliance with court orders, would be adversely affected by a stay.

Accordingly, the temporary stay granted July 22, 1988, is vacated and the motion for stay pending appeal is denied.

The motion to strike the government's response is denied.

A true copy.

ATTEST: /s/ Robert D. St. Vrain
CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

File Stamped: October 27, 1988

IN THE UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

THE UNITED STATES OF AMERICA and BRENDA KESSEL, Revenue Agent, Internal Revenue Service,	)	
Petitioners-Appellees	)	
v.	)	No. 88-1838EM
CHARLES R. HEFTI and MARION HEFTI,	)	
Respondents-Appellants	)	

THE UNITED STATES OF AMERICA and R. MICHAEL WILLIAMSON, Revenue Agent, Internal Revenue Service,	)	
Petitioners-Appellees	)	
v.	)	No. 88-2088EM
CHARLES R. HEFTI and MARION HEFTI,	)	
Respondents-Appellants	)	

MOTION TO CONSOLIDATE

Comes now the appellees in No. 88-1838EM and in No. 88-2088EM, by and through their counsel, and respectfully move that the above-captioned cases be consolidated for purposes of filing an answering brief, argument and disposition, and in support of

this motion state as follows:

1. That Charles R. Hefti and Marion Hefti (taxpayers) have appealed (No. 88-1838EM) from the order of the United States District Court for the Eastern District of Missouri (Judge Filippine), dated April 6, 1988, requiring them to comply with Internal Revenue Service summonses by turning over their original books and records to the IRS for taxable year 1985.

2. That taxpayers have also appealed (No. 88-2088EM) from the order of the United States District Court for the Eastern District of Missouri (Judge Gunn), dated July 13, 1988, holding them in contempt, requiring them to pay a $38,000 fine, and ordering them to turn over their original books and records to the IRS for taxable years 1983 and 1984.

3. That taxpayers filed their opening brief in case No. 88-1838EM on October 5, 1988, and the Government's answering brief is currently due to be filed on or before November 7, 1988.

4. That taxpayers' opening brief in

case No. 88-2088EM is due to be filed on or before April 28, 1988.

5. That the two cases arise from the same facts, involve the same issues and consist of similar District Court records.

6. That the interests of this Court and of the parties in consistency and efficiency will be served by consolidating the two cases.

7. That Charles M. Shaw, counsel for the appellants, indicated on October 14, 1988, that he has no objection to the consolidation of the two cases.

WHEREFORE, the appellees respectfully request that the motion be ganted, that Nos. 88-1838EM and 88-2088EM be consolidated for purposes of filing an answering brief, argument, and disposition, and that the due date of the consolidated answering brief be 30 days after service of the brief of the appellant in No. 88-2088EM, as provided by Rules 31(a) and 26(c) of the Federal Rules of Appellate Procedure.

/s/ William S. Rose, Jr.
WILLIAM S. ROSE, JR.
Assistant Attorney General
Tax Division
Department of Justice
Washington, D.C. 20530

Dated: This 25th day of October, 1988

CERTIFICATE OF SERVICE

It is hereby certified that service of the foregoing motion to consolidate has been made upon counsel for the appellants by mailing a copy thereof, on this 25th day of October, 1988, in an envelope, with postage prepaid, properly addressed to him as follows:

Charles M. Shaw, Esquire
225 S. Meramec-Suite 324 T
Clayton, Missouri 63105

/s/ Gary R. Allen
GARY R. ALLEN
Attorney

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-1838

United States of America,)
Brenda Kessel, Revenue Agent)
I.R.S.)
)
Appellees,)
)
Agent, I.R.S.)

Appellees,	)	
	)	
Agent, I.R.S.	)	
	)	
Appellees,	)	
	)	
v.	)	
	)	
Charles R. Hefti and Marion Hefti,	)	Appeals from the United States
	)	
Appellants.	)	District Court for the Eastern District of Missouri
No. 88-2088		
United States of America and R. Michael Williamson, Revenue Agent, I.R.S.,	)	
	)	
Appellees,	)	
	)	
v.	)	
	)	
Charles R. Hefti and Marion Hefti,	)	
	)	
Appellants.	)	

Submitted: March 13, 1989
Filed June 29, 1989

Before FAGG, BEAM, Circuit Judges, and DUMBAULD*, Senior District Judge.

The present appeals[1] involve the propriety of orders of the District Court for the Eastern District of Missouri holding appellants in contempt for failure to comply with prior orders requiring production of appellant's original records for examination

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[1] In 88-2088 the Heftis appeal from Judge Gunn's order of July 13, 1988 (Appellee's Appendix, hereafter cited as App.) 93-102. This order found the Heftis in contempt from April 9, 1988, until June 24, 1988, and directed payment of $38,000.00 within ten days. It also required turning over records to the IRS in pursuance of Judge Nangle's order of February 19, 1988 (App. 80-81) and his prior order of September 28, 1987 (App. 75) enforcing IRS summonses of July 15, 1987, concerning the tax years 1983 and 1984.

In 88-1838 the appeal is from Judge Filippine's order of April 6, 1988 (App. 46-56), based upon his prior order of November 13, 1987 (App. 30-31) enforcing IRS summons of February 17, 1987, relative to the tax year 1985.

The consolidated appeals thus cover all three tax years, and appellants have contended that the events of March 15, 1988, when they brought their records for those years to the IRS office, displayed them, and departed with them, constitute compliance with the summonses.

by the IRS pursuant to 26 U.S.C. 7602.[2] For reasons hereinafter elaborated, we affirm.

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[2] 26 U.S.C. 7602 provides, in pertinent part:

(a) For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized -- (1) To examine any books, papers, records, or other data which may be relevant or material to any such inquiry; (2) To summon the person liabile for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and (3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

Judicial enforcement of orders under 26 U.S.C. 7602 is governed by 26 U.S.C. 7604(b). Only a refusal to comply with an order of the District Court subjects the witness to contempt proceedings. Reisman v. California, 375 U.S. 440, 446 (1964); Donaldson v. U.S., 400 U.S. 517, 524-25 (1971).

From the declaration of purposes set forth in the opening words of §7602(a), it is clear that the authorization conferred upon the IRS by subsections (1) and (2) thereof "to examine" books, papers, records, or other data, [3] and to require their custodians "to produce" them and to "give . . . testimony" relevant to the inquiry, contemplates utilization of such documents and testimony for the declared purposes, namely the correct calculation and collection of tax liability. Hence the obligation imposed upon taxpayers by §7602(a) is not satisfied unless the

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[3] It is of course true that the examination authorized by subsection (1) can be and often is performed by IRS agents at the premises of, and with the consent of, the taxpayers. But it would be folly to construe subsection (2) as requiring only physical production of papers in the hearing room, without allowing reasonable examination of them so as to permit intellectual apprehension of their content by the IRS agents conducting the audit. To "produce" under subsection (2) surely must mean to produce for reasonable examination, such as if contemplated by subsection (1).

information supplied pursuant thereto is provided in such form and in such manner as will enable the IRS to utilize it effectively in fulfillment of the declared purposes, namely the calculation and collection of the correct tax liability of the taxpayers.

Present at the IRS office on May 15, 1988, were the appellants Charles and Marion Hefti, with their enrolled agent Joel Loewenstein, as well as an IRS attorney Robert Burbank, and Richard Gluck, a revenue agent.[4] The Heftis brought three briefcases (one for each of the tax years involved). Two tape recorders memorialized the meeting,

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[4] The Heftis came at 3:30 p.m. and the office closed at 4:30. Transcript of show cause hearing before Judge Filippine, pp. 14-16. Brenda Kessel, the agent in charge of the Hefti case was on vacation. Reasonably enough, the two IRS personnel present did not wish wish to examine the material produced that day. Ibid., p. 44. Later Kessel repeatedly but unavailingly attempted to have the material brought in to be microfilmed. Ibid., p. 60.

one operated by the Heftis and one by the IRS.

As Lowenstein read off from the summons each item called for, the Hefits would hold up an envelope said to contain the material responsive to that item, and would hold up documents taken from the envelope, and then replace them. The IRS men could not see what was in the envelopes.[5]

The Heftis refused to turn over their records to the IRS, but were willing to have them examined in their presence, at that time, or to return later for further examination or photostating in their presence. At no time did the IRS ever have possession of the papers or an opportunity to utilize them meaningfully in any manner to determine the Heftis' tax liability.

The chief bone of contention, for the sake of which the Heftis were willing to face incarceration to prevent the issue from

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5 Ibid., p. 30, 37-38.

becoming moot, is whether the word "produce" in 26 U.S.C. 7206(a) means "make available" or "turn over" to the IRS.[6]

However, we do not need to resolve that question[7] to dispose of the case at bar.

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[6] Ibid., 30. As Mrs. Hefti realized (Transcript of hearing before Judge Gunn, pp. 109-110), upon turnover an appeal from an enforcement order becomes moot. U. S. v. Olson, 604 F.2d 29, 31 (8th Cir. 1979); Barney v. U. S., 568 F.2d 116, 117 (8th Cir. 1978).

[7] On the merits of this issue, the government concedes that "there are no reported cases directly on point," but marshals cogent practical reasons against an interpretation that would permit an uncooperating taxpayer to "stultify" and obstruct a tax audit. Brief for the Appellees, pp. 13-14. On the other hand, if there were actual evidence of some form of "agency abuse of congressional authority and judicial process," such as bad faith, harassment, likelihood of loss or alteration of documents (of which the pro se taxpayers here are loquaciously apprehensive) the equity powers of the court could fashion an appropriate remedy. U. S. v. LaSalle National Bank, 437 U.S. 298, 318 (1978). Normally production of documents in tax cases (as in ordinary discovery proceedings and grand jury subpoenas) can be arranged to suit the convenience of all parties involved by exercise of the professional courtesy and "civility" which retired Chief Justice Burger has urged lawyers to display. Warren Burger, Address to American Law Institute, May 18, 1971.

It suffices to say that it was made perfectly clear to the Heftis that the District Court interpreted it as meaning "turn over" and did not accept the contrary Hefti position. The repeated rulings of the District Court constituted the law of the case; and if the Heftis chose not to acquiesce, their proper course was to appeal from, not to flaunt, the decisions of the District Court.[8]

Even before his memorandum and order of April 6, 1988, following the March 25, 1988, hearing requiring the Heftis to show cause why they should not be held in contempt, Judge Filippine was quite explicit in informing the Heftis that in his judgment "to produce" meant "to turn over" to the IRS their original records called for by the summons under 26 U.S.C. 7602(a). In the memorandum he explained:

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[8] U. S. v. Rylander, 460 U.S. 752, 756, 760 (1983); Bouschor v. U. S., 316 F.2d 451, 456 (8th Cir. 1963) [Blackmun, J.]; Reisman v. Caplin, 375 U.S. 440, 449 (1964).

The Court then ordered respondents to turn over their original documents to the petitioners and otherwise comply with the November 13, 1987 orders before April 11, 1988. The Court clearly indicated that failure to comply would result in a finding of contempt and the imposition of a fine.[9] The Court further found that respondents still have not complied with this Court's November 13, 1987 orders. According to the case law respondents are required to physically turn over the original documents and records requested, and not merely "present" the records. Therefore the actions of the respondents on March 15, 1988 did not constitute compliance [with 26 U.S.C. 7602] and 26 U.S.C. §7605 does not apply. Furthermore, their willingness to return with the records subsequently to the

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[9] App. 48. The court was here emphasizing and repeating its oral directions given at the hearing on March 25, 1988. Judge Filippine then indicated that as a matter of law "to comply with the summons that requires a production for examination means to leave the original records with the Internal Revenue Service. And that is what the Court is ordering the respondents to do at this time.

* * *

I say that under the court decisions you have to turn over those records and that is, I want it to be clear to you that that's what the summons says. And that's what the order of this Court requires to be done to comply with the summons. Is that clear?" Transcript of hearing before Judge Filippine, pp. 68, 73.

IRS office, is simply not practical.[10]

In the operative portion of the order itself Judge Filippine unequivocally ordered that "Respondents are directed to produce for examination, by turning over the originals, the items requested in the summonses dealing with the calendar year ending December 31, 1985, on or before April 11, 1988." [Italics supplied] The order went on to provide that each respondent, in the event of failure to comply "will be in contempt of Court and will be fined the sum of $50 per day" until such time as she or he complies with the order.[11]

Judge Gunn was no less explicit in his order of July 13, 1988. The Heftis were there "directed to obey the summonses issued on July 15, 1986" relating to the tax years

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10 App. 52.

11 App. 54.

1983 and 1984 within ten days. To forestall any further equivocation, the order specifically went on to provide that "Said compliance shall consist of producing for examination the items described in the summonses by turning over to the Internal Revenue Service the relevant ledgers, journals, summaries, books of entry, and other records."[12] [Italics supplied]

What further demonstration could the

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[12] App. 93-94. Other provisions of this order found the Heftis to be "in civil contempt of this Court from April 8, 1988 until June 24, 1988" and requiring payment into the Registry of the Court within 10 days the sum of $38,000.00. The order also provided that "if respondents fail both to pay the aforementioned sum and obey the aforementioned summonses within the date specified herein," they "shall be apprehended and remain incarcerated until such time as they pay the aforementioned sum and obey the aforementioned summonses." In his accompanying memorandum Judge Gunn made it plain that he agreed with Judge Filippine's interpretation that "the word 'produce' in the summonses requires the Heftis to turn over the requested records and documents to the IRS, and not merely to present them to the IRS for its inspection." App. 99.

Heftis ask for in order to realize that the District Court, with respect to all three taxable years involved, had adopted the IRS interpretation of 26 U.S.C. 7602(a) and rejected the interpretation so vehemently urged by the Heftis? Obviously it was the obligation of the Heftis to appeal to this Court if they were unwilling to acquiesce in the unequivocal rulings of the District Court.

The taxpayers were not free to disregard and ignore the court's decision and to behave in accordance with their own notions about the proper interpretation of the statutory language. U. S. v. United Mine Workers of America, 330 U.S. 258, 291-94, 300-303 (1947). Such private usurpation of the judicial function can not be countenanced. This is a long-recognized principle of law.

It remains to consider some subsidiary arguments advanced by appellants. Lack of jurisdiction is urged; but service of an order to show cause suffices to establish jurisdiction for contempt in an enforcement

proceeding under 26 U.S.C. 7604(b). U. S. v. Miller, 638 F.2d 39, 40 (8th Cir. 1980). Nor does issuance of a deficiency notice to prevent operation of the statute of limitations terminate the validity of a summons under 28 U.S.C. 7602(a) which was valid when issued. Couch v. U. S., 409 U.S. 322, 329 (1973). The fact that Judge Gunn left the bench after warning Mrs. Hefti that he would terminate the hearing if she persisted in disregarding his rulings as to relevance, does not indicate prejudice or unfairness towards appellants.[13] Likewise there is no merit in appellants' contention that a civil contempt fine of $38,000 is invalid because it exceeds the $1000 criminal fine prescribed by 26 U.S.C. 7210 for failure to comply with a summons. Appellants were

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[13] In fact Magistrate Kingsland and all the Judges participating in the proceedings involved in these appeals deserve commendation for their patience. The case at bar is an excellent example of the evils of pro se practice.

not being prosecuted criminally. It is an elementary rule that in civil contempt the sanctions are coercive (to encourage compliance), not punitive. Lamb v. Cramer, 285 U.S. 217, 220-21 (1932); U. S. v. United Mine Workers of America, 330 U.S. 258, 300 (1947).

A more dramatic claim is presented by the argument that Mrs. Hefti was wrongly taken into custody in the courtroom when she was there in connection with another of her tax cases. Of course there really does not exist any unconditional privilege that a person in court for one case cannot be subjected to execution of judicial process in another case.

The Supreme Court made clear in Lamb v. Schmitt, 285 U.S. 222, 225 (1932), that:

> The general rule that witnesses, suitors, and their attorneys, while in attendance in connection with the conduct of one suit are immune from service of process in another, is founded, not upon the convenience of the individuals, but of the court itself

> . . . As commonly stated and applied, it proceeds upon the ground that the due administration of justice requires that a court shall not permit interference with the progress of a cause pending before it, by the service of process is other suits, which would prevent, or the fear of which might tend to discourage, the voluntary attendance of those whose presence is necessary or convenient to the judicial administration in the pending litigation.

After quoting a passage from Parker v. Hotchkiss,[14] the Court went on to conclude:

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[14] Fed. Cas. #10,739 (Circuit Court E.D. Pa. (1849):

> The privilege which is asserted here is the privilege of the court, rather than of the defendant. It is founded in the necessities of the judicial administration, which would be often embarrassed, and sometimes interrupted, if the suitor might be vexed with process while attending upon the court for the protection of his rights, or the witness while attending to testify . . . It can be exercised or not, in each particular case, as the purposes of substantial justice may seem to require.

> It follows that the privilege should not be enlarged beyond the reason upon which it is founded, and that it should be extended or withheld only as judicial necessities require.

An earlier case, Stewart v. Ramsay, 242 U.S. 128, 130-31 (1916), likewise makes plain that exemption from process is accorded only to non-residents not normally subject to suit in the jurisdiction.[15] But the Heftis lived in St. Louis, within the jurisdiction of the District Court; hence clearly Mrs. Hefti was not entitled to immunity.

From the record before us, it is clear that Judge Gunn found that it was more convenient to the due administration of justice to take Mrs. Hefti into custody while she was present in the courtroom rather than to delay the proceedings further. Mrs. Hefti had been put on notice by Judge Gunn's order of July 13, 1988, directing the arrest of

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[15] To the same effect see In re Arthur Treacher's Franchisee Litigation, 92 F.R.D. 398, 404-406 (E.D. Pa. 1981).

the Heftis unless they turned over their records and paid the $38,000 arrears within 10 days.[16] On August 18, 1988, there having been no compliance, there was no reason why she should not have been taken into custody in the courtroom just as well as anywhere else.

Accordingly, the judgments of the District Court challenged in the present appeals are AFFIRMED.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT

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16 App. 93-94; Appellants' Brief, appendix.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 88-1838/2088-EM

United States of America, etc.,	)	
Appellee,	)	Order Denying Petition for Rehearing and Suggestions for Rehearing En Banc
vs.	)	
Charles R. Hefti, et al.,	)	
Appellants.	)	

Appellants' suggestion for rehearing en banc has been considered by the court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc.

Petition for rehearing by the panel is also denied.

August 17, 1989

Order Entered at the Direction of the Court:
Robert D. St. Vrain, Clerk, United States Court of Appeals, Eighth Circuit

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H. W. Wheeler Station
St. Louis, Missouri 63118
RC:MW:DIR:STL

Dec. 7, 1987

Tax year ended and deficiency:
See below

Person to Contact:
L. Nothstine

Contact Telephone Number:
(314) 425-4035

Social Security or Employer
Identification Number:
368-36-4709

Mr. Charles R. Hefti
Mrs. Marion Hefti
4 Rolling Rock Lane
St. Louis, Missouri 63124

Section 6661	Section 6653(a)(2)	Section 6653(a)(1)	Tax Year	Deficiency
$ 8,466	*	$1,693	12-31-83	$33,863
$ 8,335	*	$1,667	12-31-84	$33,339
$10,118	*	$2,024	12-31-85	
$40,473				

Dear Taxpayer:

We have determined that there is a deficiency (increase) in your income tax as shown above. This letter is NOTICE OF DEFICIENCY sent to you as required by law. The enclosed statement shows how we figured the deficiency.

If you want to contest this deficiency in court before making any payment, you have 90 days from the above mailing date of this letter (150 days if addressed to you outside of the United States) to file a petition with the United States Tax Court for a

redetermination of the deficiency. The petition should be filed with the United States Tax Court, 400 Second Street NW., Washington, D. C. 20217, and the copy of this letter should be attached to the petition. The time in which you must file a petition with the Court (90 or 150 days as the case may be) is fixed by law and the Court cannot consider your case if your petition is filed late. If this letter is addressed to both a husband and wife, and both want to petition the Tax Court, both must sign the petition or each must file a separate, signed petition.

If you dispute not more than $10,000 for any one tax year, a simplified procedure is provided by the Tax Court for small taxes cases. You can obtain information about this procedure, as well as a petition form you can use, by writing to the Clerk of the United States Tax Court at 400 Second Street NW., Washington, D.C. 20217. You should do this promptly if you intend to file a petition with the Tax Court.

If you decide not to file a petition with the Tax Court, we would appreciate it if you would sign and return the enclosed waiver form. This will permit us to assess the deficiency quickly and will limit the accumulation of interest. The enclosed envelope is for your convenience. If you decide not to sign and return the statement and you do not timely petition the Tax Court, the law requires us to assess and bill you for the deficiency after 90 days from the above mailing date of this letter (150 days if this letter is addressed to you outside the United States).

If you have any questions about this letter, please write to the person whose name and address are shown above, or you may call that person at the number shown above. If this number is outside your local calling area, there will be a long distance charge to you. If you prefer, you may call the IRS telephone number listed in your local directory. An IRS employee there will be able to help you, but the office at the

address shown on this letter is most familiar with your case.

When you send the information we requested or if you write to us with questions about this letter, please provide your telephone number and the most convenient time for us to call if we need additional information. Please attach this letter to any correspondence to help us identify your case. Keep the copy for your records.

Thank you for your cooperation.

*Fifty percent of the interest due on the deficiency is due to negligence.

Sincerely yours,

Lawrence B. Gibbs
Commissioner
By /s/ Ralph F. Shilling
Ralph F. Shilling
District Director
St. Louis, Missouri

cc: Mr. Jack R. Closson
Mr. William Fisher
1114 Market Street
St. Louis, MO 63101

Enclosures:
Copy of this letter
Waiver
Envelope

Investors Title Company
32 S. Central Ave.
Clayton, Mo 63105
(314) 862-0303

Mark Twain Bank Clayton
Mark Twain Bank, N.A.
St. Louis, Missouri 63105

October 4, 1988

PAY THIRTY-EIGHT THOUSAND SIX HUNDRED FIFTY-ONE AND 54/100 DOLLARS $38,651.54

TO THE ORDER OF
UNITED STATES OF AMERICA

/s/ Investors Title Company

RE SETTLEMENT ON:

FILE NUMBER: B68640
CHECK NUMBER: 48761
CASH ACCOUNT: 1 ESCROW ACCT: 68408-88
BORROWER: Charles A. Weiss
SELLER: Charles R. Hefti
$38,651.54

#4 Rolling Rock Lane
St. Louis, MO 63125

FOR: UNITED STATES LIEN

UNITED STATES TAX COURT
DOCKET ENTRIES

01 03/07/88 PF PETITION filed:Fee Paid R03/08/88

02 03/07/88 AP AMENDED PETITION filed. R 03/14/88

03 04/18/88 DPT DESIGNATION of Triat at St. Louis, MO B 04/19/88

04 04/18/88 AAP ANSWER TO AMENDED PETITION (C/S 04/15/88)

05 05/09/88 NTD NOTICE of Trial on 10/11/88 at St. Louis, MO. B 05/09/88 C

06 05/09/88 SPTO STANDING PRE-TRIAL ORDER attached to Notice of Trial B 05/09/88 C

07 05/31/88 MOTD MOTION by resp. for leave to file Amendment to Ans. to AP. (S GR 06/06/88 B 06/06/88 C 5/26/88) (Amendment to Ans to AP - LODGED (S 5/26/88)

08 06/01/88 MOTP MOTION by petr. to compel discovery re:Inter. (S 5/28/88) ORD 06/08/88

09 06/06/88 ATA AMENDMENT TO ANSWER to Amended Petition P 06/06/88 C

10 06/08/88 O ORDER P.Mot filed 6/1/88 granted, Resp by 6/29/88 answer P/inter. ORD 09/02/88 B 06/09/88 C

11 06/28/88 MOTR MOTION by resp. to vacate Order dtd 6/8/88. ORD 09/02/88

12 08/29/88 MOTR MOTION by resp. under Rule 37(c).(S 8/24/88)

13 08/30/88 RESP RESPONSE by Petrs to motion filed 8-29-88. (S 8-25-88)

14 09/02/88 O ORDER that petrs shall by 9-16-88 submit a reply. B 09/08/88 C

15 09/02/88 O ORDER that resp's motion filed 6-28-88 is granted and 6-8-88 order is vacated. B 09/08/88 C

16 09/16/88 O ORDER time extended to 9/23/88 for Petr to file Reply. R 09/18/88

17 09/20/88 MOTP MOTION by petr. to extend time to Answer Ord dtd 9/16/88.(S 9/16/88) ORD 09/21/88

18 09/21/88 O ORDER time extended to 10/3/88 for Petr to file Repsonse. B 09/21/88 C

19 09/21/88 MOTP MOTION by petr. for summary judgment & for sanctions. (S 9/18/88) DN 09/22/88 B 09/23/88 C

20 09/21/88 MEMO MEMORANDUM OF LAW by Petr in support of mot dtd 9/21/88. (S 9/18/88)

21 09/26/88 MOTP MOTION by petr. to vacate Courts Ord dtd 9/2/88. (S 9/23/88) DN 09/30/88 B 10/03/88 C

PURCHASER'S RECEIPT
RETAIN FOR YOUR RECORDS

Heritage National Bank 3200
7435 Watson Road
St. Louis, Missouri 63119

Payable to Internal Revenue Service

$132,081.99

CASHIER'S CHECK /s/ _____